

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:
PARKVIEW AT ASPEN HILL, LLLP
Applicant

Ivy Dench-Carter
Todd Reddan
Kevin Foster
Judith Miller
Christopher Kabatt

For the Application
Patricia Harris, Esquire
Attorney for the Applicant

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OZAH Case No. CU 17-04

Before: Martin L. Grossman, Hearing Examiner
Director, Office of Zoning and Administrative Hearings

HEARING EXAMINER’S REPORT AND DECISION

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I. STATEMENT OF THE CASE AND DESCRIPTION OF PROCEEDINGS

On August 22, 2016, Parkview at Aspen Hill, LLLP (hereinafter “Applicant” or “Parkview”)¹ filed an application seeking a conditional use to establish an Independent Living Facility for Seniors or Persons with Disabilities, consisting of 120 dwelling units. The subject site consists of a 5.68 acre property (247,256 square feet), identified as part of Parcel P776 on Tax Map HR 53. It is located at 3132 Bel Pre Road, in the Aspen Hill area of Silver Spring, approximately 1,300 feet east of the intersection of Bel Pre Road and Connecticut Avenue. It is in the RE-2 Zone and is subject to the 1994 Aspen Hill Master Plan. The property is owned by Potomac Conference Corporation of Seventh Day Adventists (Tax ID No. 13-00975824), which has authorized the conditional use application. Exhibit 12.

The conditional use is sought pursuant to Section 59.3.3.2.C.2.b. of the Zoning Ordinance.² By Notice issued on November 1, 2016, the Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on December 16, 2016. Exhibit 25.

On November 16, 2016, Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report, recommending approval of the application, based on amended plans and subject to 10 proposed conditions. Exhibit 28.

Proposed amendments to some of the plans and supporting documents were filed with OZAH by the Applicant on November 16, 2016 (Exhibits 26(a) – (e)), and OZAH issued a notice of the motion to amend on December 2, 2016, giving parties until December 12, 2016 to object to the motion (Exhibit 27). No letters opposing the amendments were received, and the amendments to the application were automatically granted on December 12, 2016.

¹ Parkview at Aspen Hill, LLLP is a joint venture composed of Pennrose GP, LLC; Pennrose LP, LLC; and Shelter Development, LLC. It will be succeeded in ownership by Park View at Aspen Hill LLC, in which the Montgomery County Housing Opportunities Commission ("HOC") will have a tiny ownership interest. Exhibits 40 and 45.

² All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended effective 12/25/15, in ZTA 15-09 (Ordinance No. 18-08, adopted 12/1/15).

The Montgomery County Planning Board met on December 1, 2016, and unanimously recommended approval of the application, but with a modified lot design. The Board adopted the conditions recommended by Staff, but noted that it did not support a parking waiver reducing the number of long-term bicycle parking spaces from 29 to four. The Board concluded that at least ten long-term bicycle parking spaces should be provided so residents could safely store bicycles on the property. Exhibit 29, p. 1. The Planning Board approved the Preliminary Forest Conservation Plan (No. CU 17-04) and the tree variance associated with the application. Exhibit 29, p. 2.

On December 9, 2016, the Hearing Examiner requested Technical Staff to file a supplemental report indicating what effect the new Subdivision Staging Policy (“the new SSP”) for 2016-2020³ will have, if any, on this case, since it will go into effect before the conditional use application is acted on. Exhibit 32(a). On December 15, 2016, the Hearing Examiner asked Staff and the Applicant to analyze the impacts if Zoning Text Amendment (ZTA 16-15) is adopted by the Council because it would modify the standards for this type of conditional use. Exhibit 34.

The December 16, 2016, public hearing proceeded as scheduled. The Applicant called five witnesses, and there was no other testimony. The Applicant had indicated that it intended to file for subdivision before the new SSP takes effect on January 1, 2017 (Exhibit 32(b)), but it also produced expert evidence that the new SSP would have no impact on this case. Tr. 136-140. Since the Applicant filed an amended Conditional Use Plan at the hearing (Exhibit 37) and supplemented the record with a letter on December 22, 2016, regarding ZTA 16-15 (Ex. 40),⁴ the Hearing Examiner gave the public and Technical Staff until January 13, 2017 to comment upon the new filings, which Staff did on December 29, 2016 (Exhibits 42 and 44), approving changes to the plans and noting one needed correction. The Applicant also responded on December 29,

³ The 2016-2020 Subdivision Staging Policy was adopted on November 15, 2016, in Council Resolution No. 18-671, effective January 1, 2017.

⁴ The Applicant’s letter also addressed questions identifying the members of the Applicant partnership. Exhibit 40.

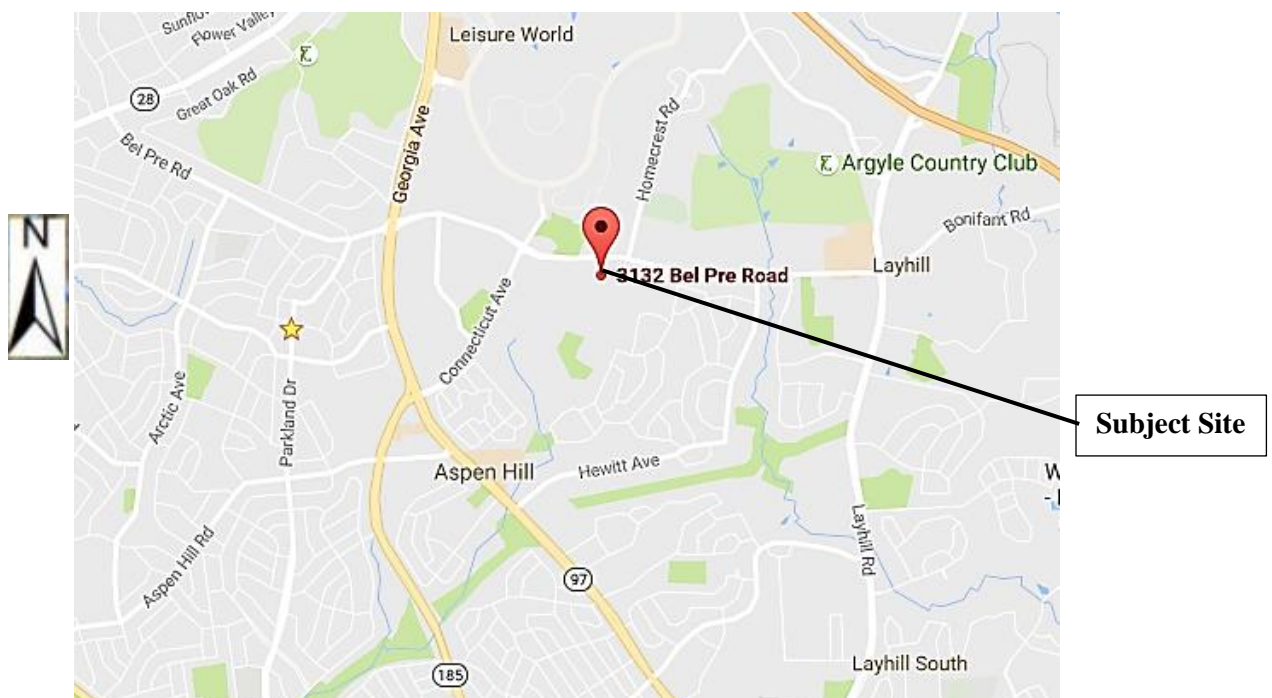
2016 (Exhibit 45) and filed a corrected Conditional Use Cover Sheet (Exhibit 46) on January 3, 2017. There were no further filings, and the record closed, as scheduled, on January 18, 2017.

Based on the entire record, the Hearing Examiner finds that the proposed use, as represented in the Conditional Use Plan (Exhibits 46 and 37(b) – (l)), will meet all the criteria specified in the Zoning Ordinance. More specifically, it will be compatible with the neighborhood; it will be consistent with the goals of the applicable Master Plan; it will not have undue adverse effects on the neighbors; it will comply with development standards; and it will not harm the environment. Therefore, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV of this Report and Decision.

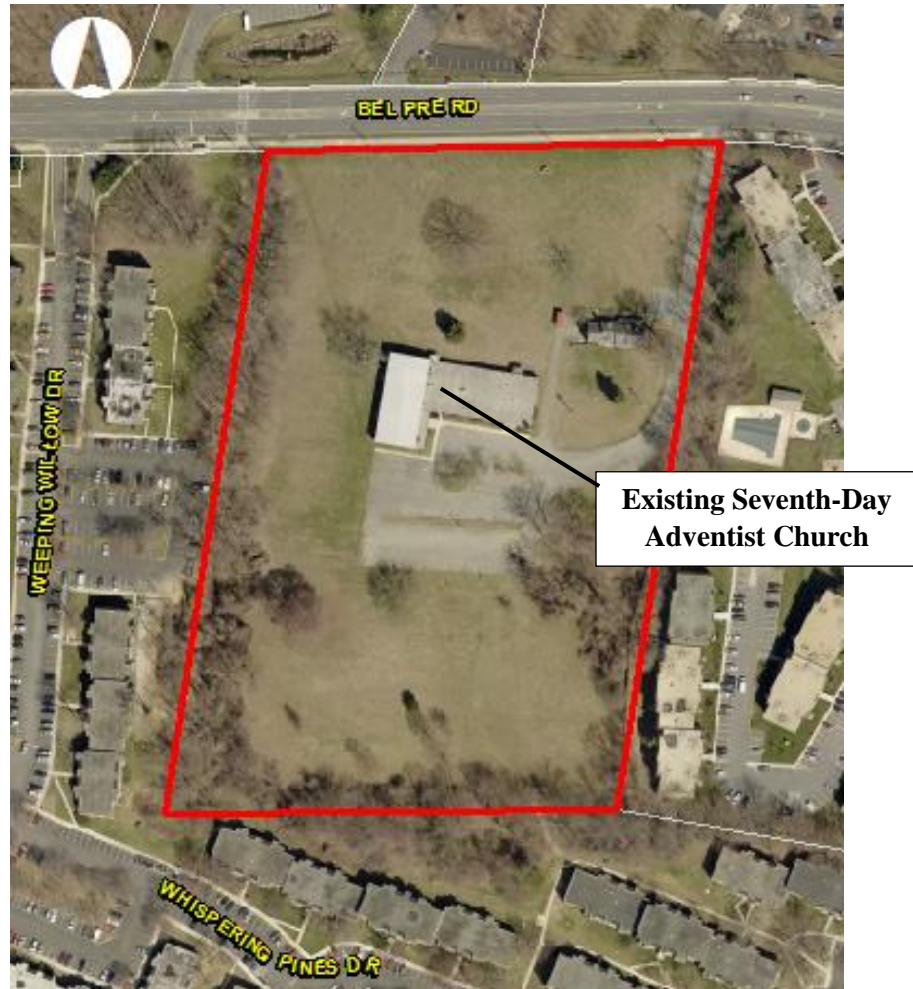
II. FACTUAL BACKGROUND

A. The Subject Property

The subject site consists of 5.68 acres of land (after subdivision) in the RE-2 Zone. It is located at 3132 Bel Pre Road, in the Aspen Hill area of Silver Spring. The property is situated on the south side of Bel Pre Road, approximately 1,300 feet east of the intersection of Bel Pre Road and Connecticut Avenue, as can be seen on the Vicinity Map provided by Technical Staff:



Staff reports that the conditional use site (247,256 square feet), is part of an 11.7-acre (509,568 square foot) Parcel (P776) that the Applicant plans to subdivide into two lots if the conditional use is approved. It is shown below in an aerial photo provided by Technical Staff (Exhibit 28, pp. 3-4):



Aerial View of Parcel P776 (outlined in red)

As described by Technical Staff (Exhibit 28, p. 3),

The Parcel is improved with the Wheaton Seventh-Day Adventist Church, associated surface parking, and a detached house that serves as the pastor's residence. An existing driveway on the east side of the Property provides access to the church and detached house from Bel Pre Road. The southern portion of the Parcel is currently a grassy open space bordered with trees. The Applicant anticipates that after subdivision of the Parcel, the Property will be approximately [5.68] acres⁵ and irregular in shape.

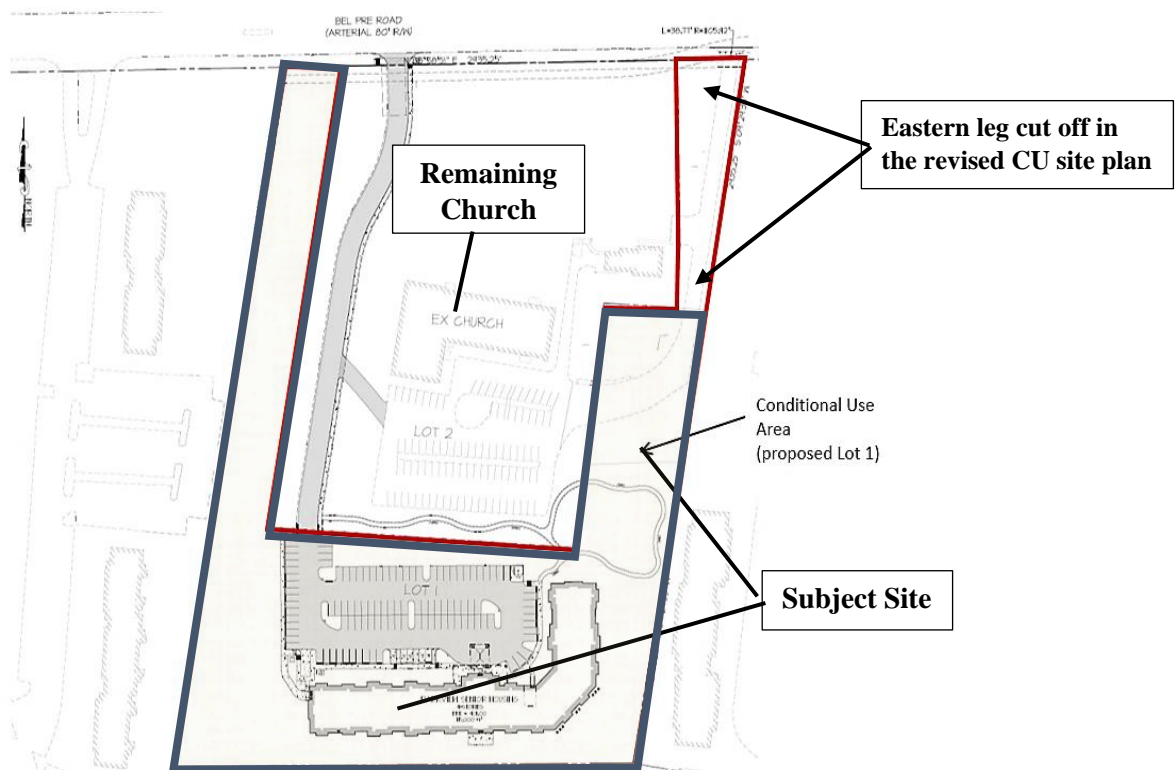
⁵ The latest revision to the plans (Exhibits 37 & 46) reduced the proposed size of the site from 5.99 acres to 5.68 acres (247,256 square feet). The remaining church parcel will be 6.02 acres (262,312 square feet).

A photograph of the existing church from the staff report is reproduced below:



Existing Church (from Bel Pre Road facing south)

The irregular, u-shaped, conditional use site originally proposed by the Applicant is shown in the Staff report (Exhibit 28, p. 5). It is reproduced below, with the new, truncated, dipper-shaped, version from the revised plans (Exhibits 46 and 37) superimposed with heavy lines:



Conditional use area (Property) outlined in red. The existing and proposed buildings are shown

B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Technical Staff defined the boundaries of the surrounding area as follows: “The Neighborhood is generally bound[ed] by Beaverwood Lane and Peppertree Lane to the south, Beaverwood Lane to the east, Big Bear Terrace and the southern edge of Leisure World to the north, and Connecticut Avenue to the west.” Ex. 28, p. 5. The Staff-defined neighborhood and two adjacent properties are depicted in photographs provided by Staff (Ex. 28, p. 6):



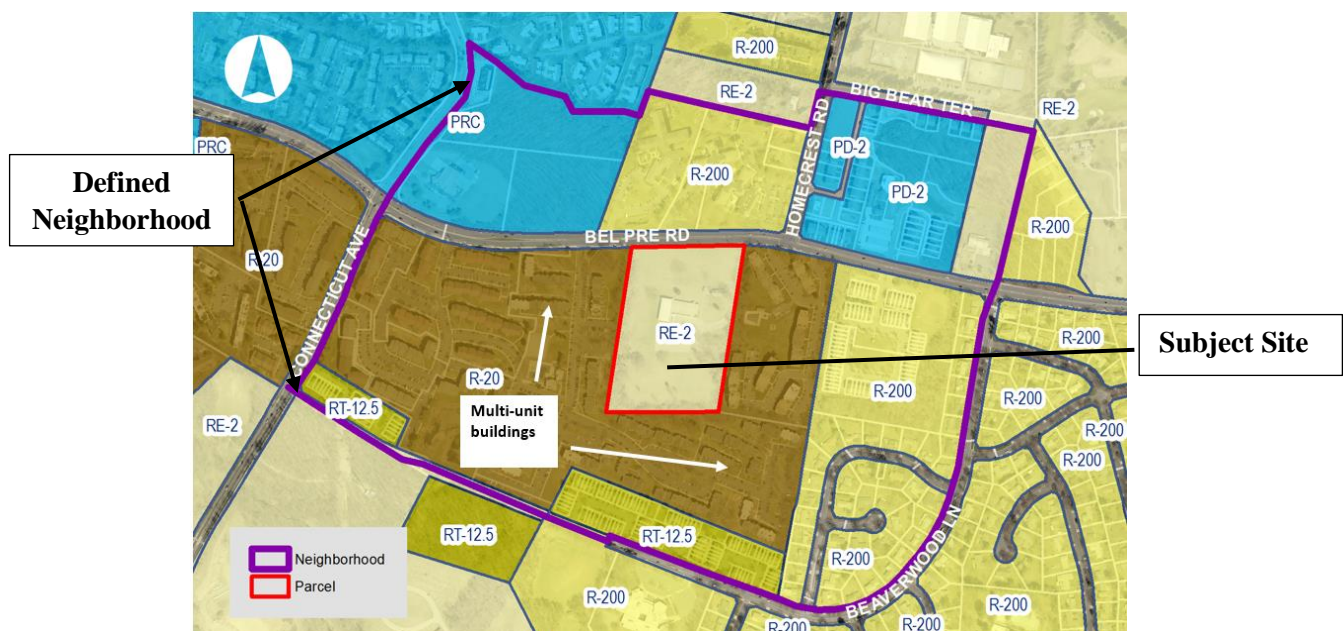
Multi-unit buildings on properties to the west (picture on left) and to the south (picture on right)

Technical Staff's definition of the neighborhood is the same as that proposed by the Applicant in its land use report (Exhibit 3, p. 2). The Hearing Examiner accepts the proposed definition of the neighborhood, as it includes the area and uses most likely to be affected by the proposed facility.

Technical Staff also described the defined neighborhood and provided a map showing the zoning within the neighborhood (Exhibit 28, pp. 5-7), both of which are reproduced below:

The Neighborhood is predominantly residential with detached houses and townhouses in the R-200, PD-2, PRC, RE-2, and RT-12.5 zones, and 3-4 story multi-unit buildings in the R-20 zone. The parcel is surrounded on three sides by multi-unit buildings. The Neighborhood also contains a number of non-residential uses including Aquarius Local Park, Montgomery County Fire Station 25, and two religious institutions. Several existing and approved conditional uses (formerly special exceptions) are also located within the Neighborhood. Most of them are clustered on the north side of Bel Pre Road close to the intersection with Homecrest Road. The conditional uses in the Neighborhood are:

- Wheaton Moose Lodge; 2901 Bel Pre Road; approved in 1978 by BAS 654;
- Genesis Healthcare- Layhill Center (nursing home); 3221 Bel Pre Road; approved 1985 by BAS 1200 and 1200A;
- Aspenwood Senior Living Community (independent and assisted living); 14400 Homecrest Road; approved 1986 by BAS 1355 and BAS 1355-A;
- Winchester School; 3223 Bel Pre Rd, approved 1980 by S-753; and
- Topknotch Learning Center (child day care); 14217 Pear Tree Lane #11; approved 1977 by BAS-548 and 548-A.



C. Proposed Use

The Applicant seeks a conditional use, pursuant to Section 59.3.3.2.C.2.b. of the Zoning Ordinance, to construct and operate an Independent Living Facility for Seniors or Persons with Disabilities, consisting of 120 independent living units. As described by the Technical Staff (Exhibit 28, pp. 7-9),

The Applicant proposes to develop the Property with a four-story, 115,000-square-foot, affordable, independent living facility for seniors who are 62 years of age or older. The Applicant intends to provide a facility to accommodate senior residents who value self-reliance but are in need of minor support. The proposed building will include 120 independent living units (61 one-bedroom and 59 two-bedroom units). 108 of the units in the building will be affordable to residents at or below 30%, 40%, 50%, and 60% of the Area Median Income (AMI), and 15% of the units will be reserved households of very low income (at or below 50% AMI). Affordable units will be regulated by the State Department of Housing and Community Development under the Low Income Housing Tax Credit program. Amenity spaces, support, and special assistance will be provided to the facility's residents.

1. Site Plan, Elevations and Floor Plans

The intended design of the site was explained by Staff in its report (Exhibit 28, p. 9):

The existing driveway to the church and detached house will be removed, and a new driveway will be constructed on the west side of the Parcel to provide access to the existing church and pastor's residence and to the proposed assisted living facility. A proposed five-foot sidewalk along the driveway will provide pedestrian access between the independent living facility and Bel Pre Road. The proposed driveway and sidewalk will traverse the church property with an access easement for use by the independent living facility. The sidewalk to Bel Pre Road will connect with a six-foot sidewalk in front of the building and to the walking path located to the north of the proposed building. The building's loading area will be located on the western end of the building and screened with landscaping. The facility will provide a total of [117]⁶ parking spaces in a surface lot in front of the building. Five short-term and [ten]⁷ long-term bicycle parking spaces are proposed in front of the west side of the proposed building.

Applicant's land planner, Kevin Foster, testified that the site was designed (Tr. 100):

. . . to nestle [the proposed building] into the back of the site behind the church, use the church as a buffer, but then also use as much of the existing screening around

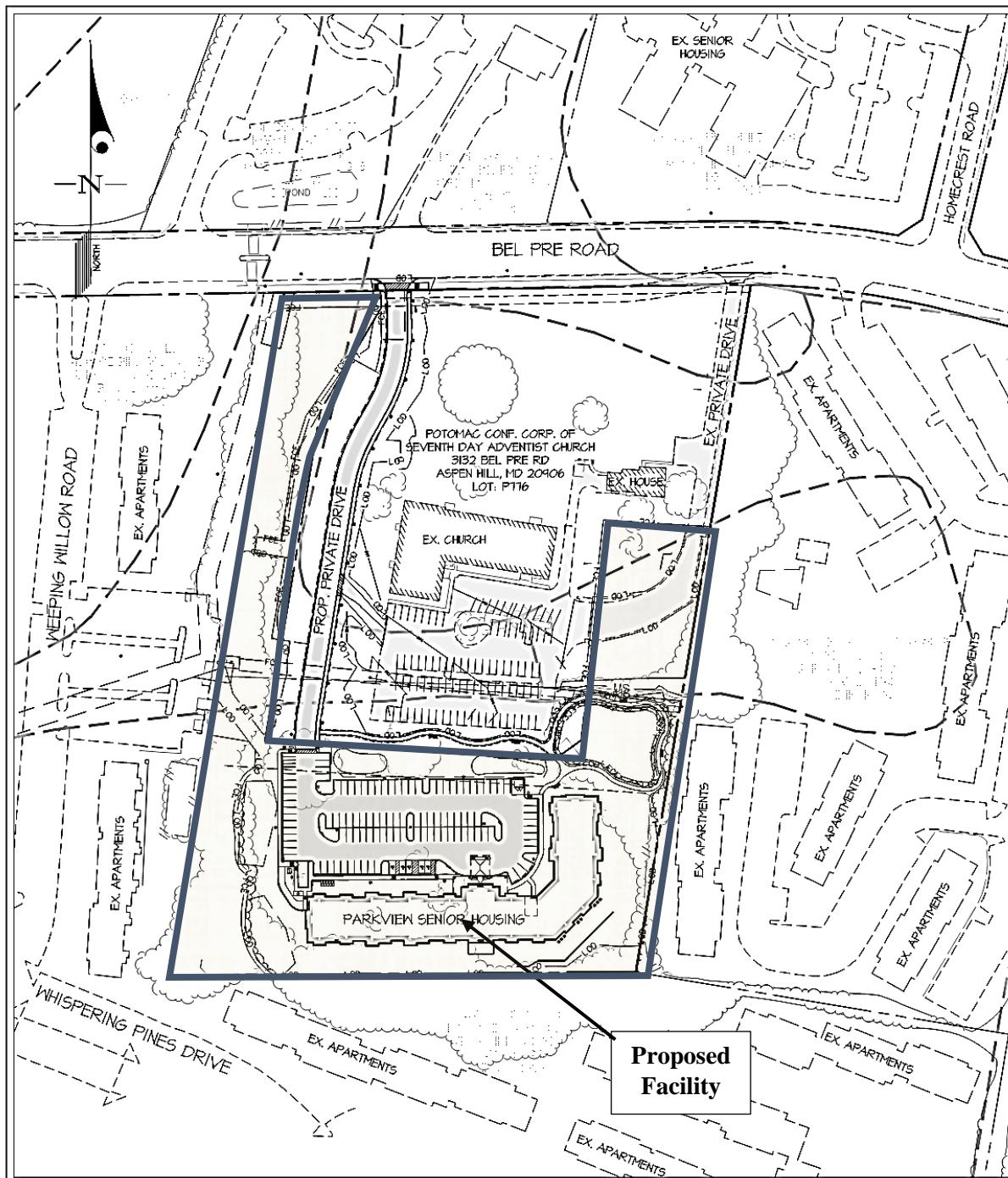
⁶ The Applicant noted at the hearing that the actual number of parking spaces provided will be 117, not 115. Tr. 47.

⁷ Per the recommendation of the Planning Board (Exhibit 29), the Applicant has increased the number of long term bicycle spaces from 4 to 10. Tr. 6-7.

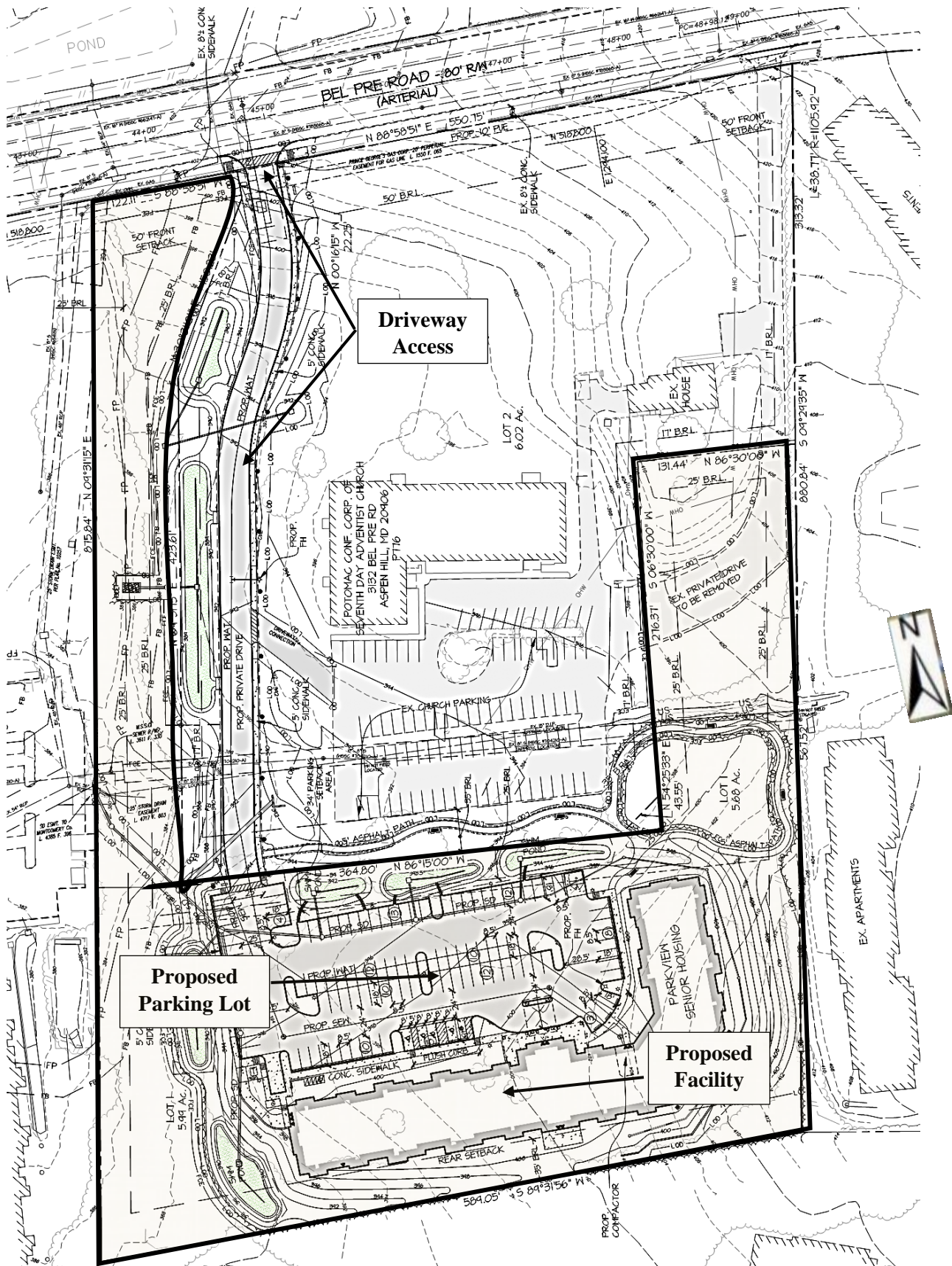
the site where it was possible with the existing forest stand on the eastern side of the site, the existing tree stand on the western side of the site where we could keep that to create as much buffer as we can and then using the L shape of the building as a buffer for then putting the parking in the middle of the site.

The subject site and its immediate surroundings, as conceived by the Applicant following subdivision, are shown below in the revised Conditional Use Plan Cover Sheet (Exhibit 46).

More detailed views, site data and general notes are shown on the following pages:



The revised, overall Conditional Use Site Plan (Sheet 3 - Exhibit 37(c)) is set forth below:



SITE DATA

L: 2994 F: 392

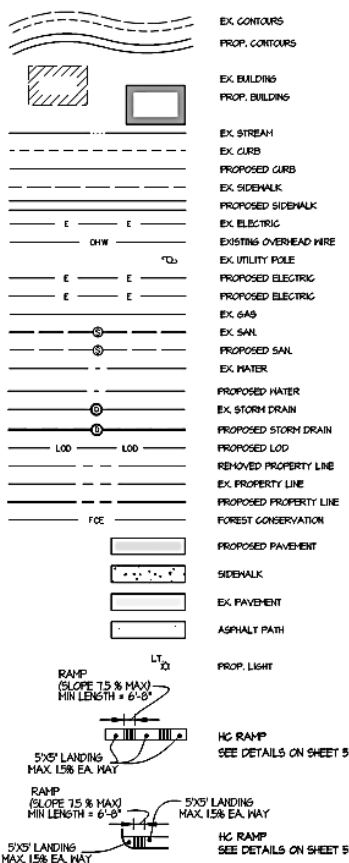
*Waiver requested

ZONING STANDARDS**LOT 1**

	<u>ALLOWED/REQUIRED</u>	<u>PROPOSED</u>
Minimum Lot Area (Sec 54-4 4.4.4. (B)(1))	2.0 Ac.	5.68 Ac.
Minimum Lot Width at Street (Sec 54-4 4.4.4. (B))	25 ft	122 ft
Lot Coverage (Sec 54-4.4.4 (B)(1))	25%	12%
	65,262 sq.ft. Allowed	28,800 sq.ft.
Max. Percentage of Surfaced Area In Front Yard	25% Allowed	0%,
<u>Building Setbacks (Sec 54-4.4.4(B)(2))</u>		
Street	50 ft	640 ft
Side (sec 3.3.2(C)-2b(vii))	25 ft	East Side = 62 ft West Side = 153 ft North Side = 42 ft. Rear = 36 ft
Rear	35 ft	
Building Height	50-ft (Sect. 4.4.4.B.3)	4 Stories, 50 ft
	60-ft Sect. (3.3.2.C.2.b.v)	
Green Area (Sec 54-3 3.3.2. C-2(b) viii)	10%	71.8%
	173,079 SF Req'd	177,651 sq.ft.
<u>Parking Setbacks (Sec 54-6.2.5(J))</u>		
Street	50 ft	128 ft
Rear	35 ft	112 ft
Side (twice setback)	34 ft Each Side (2 x 17-ft)	East Side = 145 ft West Side = 93 ft North = 9 ft *

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EXISTING CONDITIONS	2 OF 12
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SITE PLAN (30 SCALE)	4 OF 12
SITE PLAN (30 SCALE)	5 OF 12
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LANDSCAPE PLAN	9 OF 12
LANDSCAPE DETAILS	10 OF 12
SITE LIGHTING PLAN	11 OF 12
SITE LIGHTING PLAN & DETAILS	12 OF 12

- * waiver/variance from parking setback requested

LEGEND**GENERAL NOTES:**

- OWNER: POTOMAC CONFERENCE CORP. OF 7th DAY ADVENTIST
3132 BEL PRE ROAD
SILVER SPRING, MD 20906
- DEVELOPER/APPLICANT: PARKVIEW AT ASPEN HILL, L.L.C.
575 SOUTH CHARLES STREET
SUITE 140
BALTIMORE, MD 21201
443-423-1172
- BOUNDARY SURVEY BY: GUTSCHICK, LITTLE & WEBER, P.A. MARCH 2016
- AERIAL TOPOGRAPHY BY: MD NATIONAL CAPITAL PARK & PLANNING COMMISSION
GUTSCHICK, LITTLE & WEBER, P.A. MARCH 2016
- NRI BY: GUTSCHICK, LITTLE & WEBER, P.A. #420162110
APPROVED 7-19-16.
- TRAFFIC STATEMENT BY: WELLS AND ASSOCIATES
- STORMWATER CONCEPT BY: GUTSCHICK, LITTLE & WEBER
SNM CONCEPT No. 201902
- PHOTOMETRIC AND LIGHTING PLAN BY: PHILLIPS LIGHTING
- WATERSHED: NORTHWEST BRANCH
USE CLASS: I-P
- DEVELOPMENT PROGRAM: ONE PHASE
- PROPOSED ON-SITE WATER AND SEWER SERVICE WILL BE PRIVATE THE EXISTING WATER AND SEWER CATEGORIES ARE W-I & S-I.
- THERE ARE NO KNOWN RARE, THREATENED OR ENDANGERED SPECIES ON SITE.
- THERE ARE NO KNOWN HISTORIC FEATURES ON SITE.
- ALL UTILITIES ARE CONCEPTUAL AND SUBJECT TO CHANGE. SEE APPROPRIATE APPROVED UTILITY DRAWINGS. (PEPCO, VERIZON, COMCAST & WASHINGTON GAS).
- UTILITY COMPANIES: GAS - WASHINGTON GAS
ELECTRIC - PEPCO
WATER & SEWER - WASHINGTON SUBURBAN SANITARY COMMISSION
TELEPHONE - VERIZON
CABLE - COMCAST
- THIS PLAN IS SUBJECT TO A FOREST CONSERVATION PLAN.

Technical Staff further described the design of the site and the proposed building to house the independent living facility (Exhibit 28, p. 8-10):

The proposed building and associated surface parking will be located behind the existing church, and largely screened from view from Bel Pre Road. The exterior of the proposed building is designed to be residential in appearance, and the building will incorporate brick and cementitious siding into the facades to be consistent with the surrounding multi-unit buildings. The roof will be architectural composition shingle, supported on decorative traditional-styled columns. The facades will also incorporate a traditional styling of gable roofs, large windows, traditional trim, and a variety of siding details. Brick soldier courses will be used at window and door heads, and also capping the brick where it transitions to siding to enhance the change in materials. Windows will be framed with wide trim and cornices. The main entrance to the building will be highlighted by a covered porch. Architectural elements are intended to maintain the residential character of the surrounding area and break down the bulk and scale of the building to be compatible with the Neighborhood.

* * *

Outdoor amenity spaces for residents will be located around the periphery of the Property, primarily to the north and south of the proposed building. An outdoor patio area with seating will be located to the south (rear) of the building, and a five-foot walking path with benches will be located in front of the building, extending around a tree save area and the parking lot. A portion of the path will be located on the proposed church property (proposed lot 2) with an easement allowing the path to be used by residents of the independent living facility.

* * *

A generator with self-contained noise attenuation will be located to the west of the building. The dumpster will be located in the northeast corner of the parking lot, and the Applicant indicates that it will be emptied approximately twice per week.

The described architectural features can be seen in the elevations provided by the Applicant (Exhibit 16):

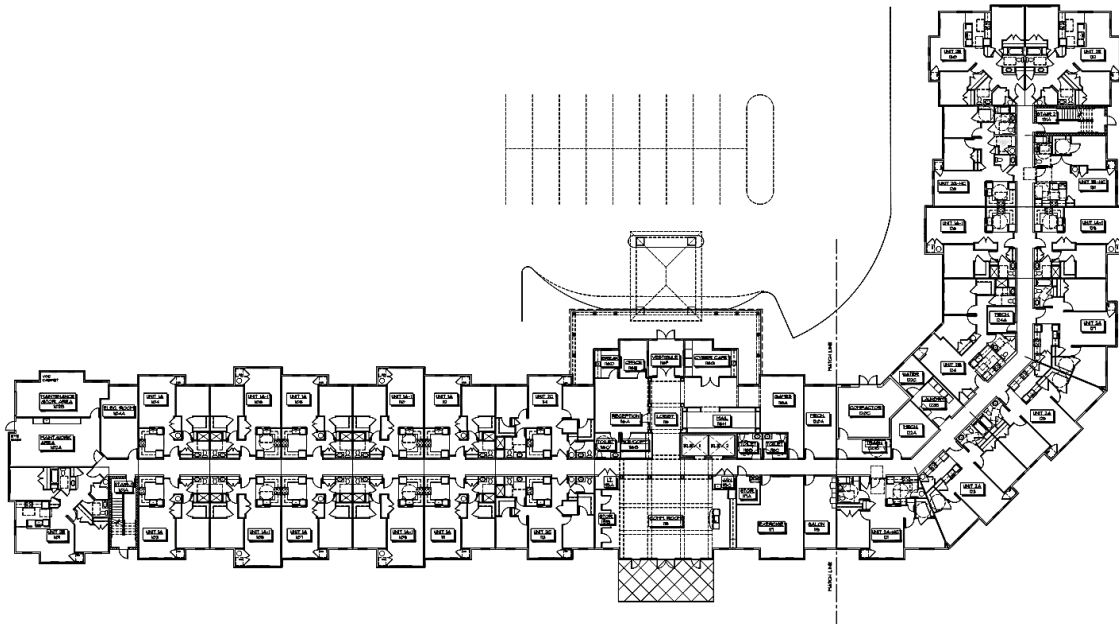




Applicant's architect, Judith A. Miller, testified at the hearing regarding her design of the proposed building (Tr. 113):

As you can see in this rendering, it's a four story building, peaked roofs, siding, brick, and, you know, traditional windows, which are very compatible with the area. And in my visits to the site, you know, adjacent to it are multi-family projects three and four stories of similar scale and architectural design. . . . [we] felt that it made the most sense to put it exactly where it was to provide the buffering of the adjacent properties and, you know, keeping it 600 plus feet from the main road. We also tried to use similar materials. There is a fair amount of brick in the area; a fair amount of siding. So we did that as well as the peaked roofs are very compatible.

The Floor Plan for the first floor of the proposed facility (Exhibit 11) is depicted below:

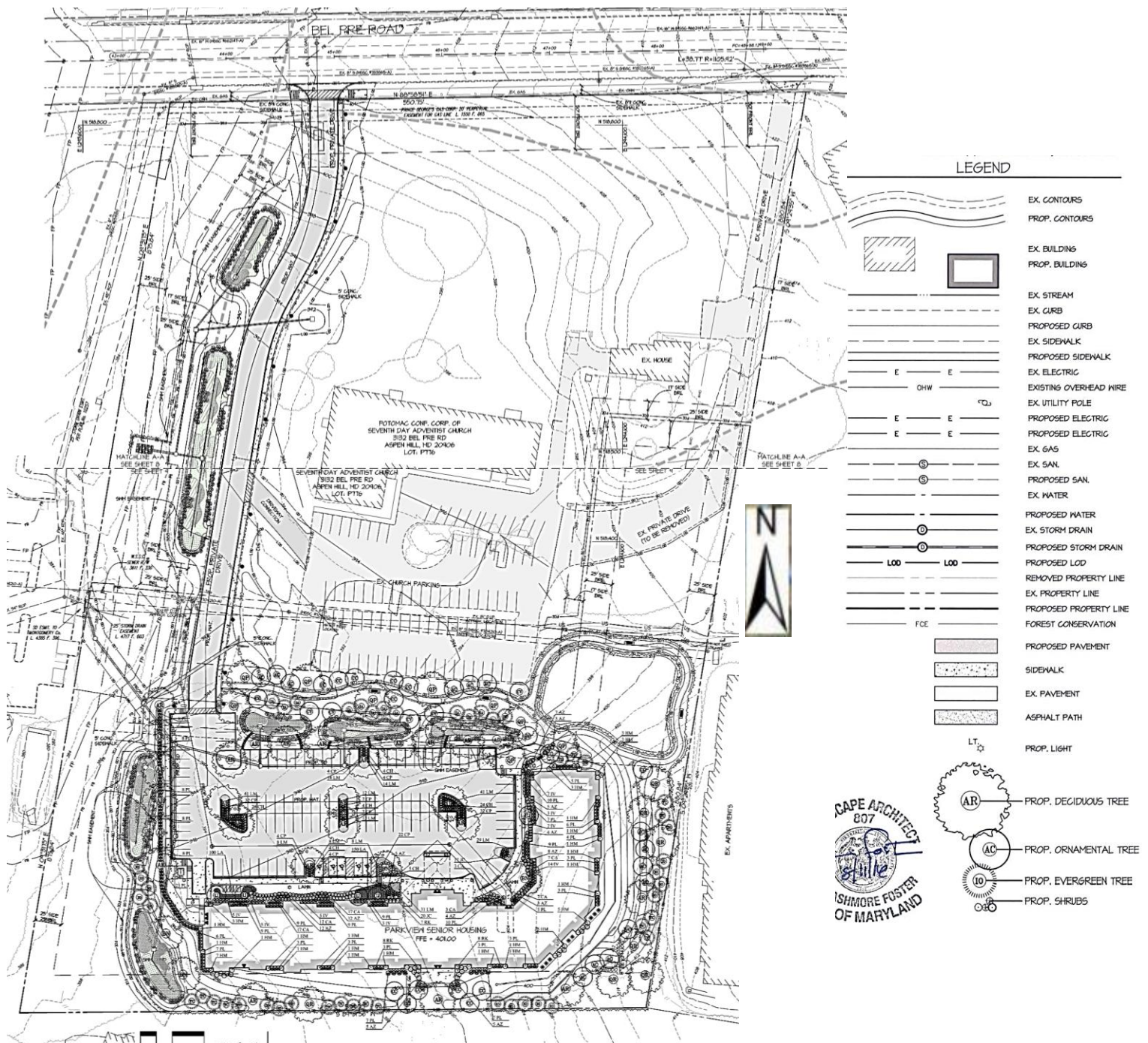


Ms. Miller testified that there is a covered porch to share at the entry. Off of that are the leasing offices and the manager offices as well as the cyber cafe, community space, a kitchenette, a salon, a fitness area. "There's a generous amount of community spaces for the residents of this building." Tr. 115.

2. Site Landscaping, Lighting and Signage

a. Landscaping:

Landscaping proposed for the site is shown on Applicant's "Conditional Use Landscape Plan" (Exhibits 37(h), (i) and (j)). Portions of these plans are reproduced below and on the following pages (omitting some details and the lengthy list of plant names):



LANDSCAPE SPECIFICATIONS

- 1.0 GENERAL CONDITIONS
- 1.1 SCOPE OF WORK
- The landscape contractor shall provide all materials, labor and equipment to complete all landscape work as shown on the plans and specifications.
 - Total number of plants shall be drawn on the landscape plan. If there is a discrepancy between the drawing and the list on the plans, the contractor shall request clarification from the landscape architect.
- 1.2 STANDARDS
- All plant material shall conform to the current issue of the American Standard for Nursery Stock published by the American Association of Nurserymen. All trees to branch symmetrically around central leader. No forked leader stock will be accepted.
 - Plant material must be selected from nurseries that have been inspected and certified by state plant inspectors.
 - Nomenclature will be in accordance with Hortus III by L.H. Bailey.
- 1.3 SUBMITTALS
- When requested by the owner or owner's representative, samples of all material other than plants shall be submitted to the owner's designated representative for approval.
- 1.4 APPROVALS
- All approvals will be in writing.
- 1.5 SUBSTITUTIONS
- M-N-C-P-C staff approval required for planting plan substitutions.
- 1.6 UTILITIES AND UNDERGROUND FEATURES
- The landscape contractor shall notify utility companies and/or the general contractor in advance of construction to locate utilities.
- 1.7 DRAINAGE
- If plants are to be installed in areas that show obvious poor drainage, and the plants are inappropriate for that condition, the landscape contractor shall notify the landscape architect and owner. If they deem necessary, the plants shall be relocated, the contract shall be adjusted to allow for drainage correction at a negotiated cost, or the plant selection modified by the landscape architect to accommodate the poor drainage situation.
- 1.8 WORKMANSHIP
- During delivery and installation, the landscape contractor shall perform in a workmanlike manner, coordinating his/her activities so as not to interfere unduly with the work of other trades and leaving his/her work area(s) clean of litter and debris at the close of each workday.
 - During planting, all areas shall be kept neat and clean; precautions shall be taken to avoid damage to existing plants, large trees, turf and structures. Where existing trees are to be preserved, additional precautions should be taken to avoid unnecessary accumulation of excavated materials, soil compaction or root damage.
 - Upon completion, all debris and waste material resulting from planting operations shall be removed from the project and the area cleaned up.
 - Any damage to the existing utilities, buildings, paving, curb and walls, and vegetation (not so designated for removal on these plans) shall be repaired to previous condition or replaced by the Contractor at his expense.
- 1.9 WATER
- The owner shall supply water on site at no cost. If the landscape contractor has to supply water to the site, it shall be at an additional cost.
- 1.10 PLANTING SEASONS
- Red Oak, White Oak, Willow Oak, Scarlet oaks, Dogwood, Sweet Gum, conifers, and Broad Leaf Evergreens will not be planted between November 15 and March 1, unless the landscape contractor states in writing that he/she will guarantee plants.
- 1.11 INSPECTIONS AND ACCEPTANCE
- Initial inspection: Prior to planting, all plant locations shall be staked in the field by the contractor. The landscape architect shall be contacted to inspect and approve all plant locations before planting.
 - Final acceptance inspection: A verification of performance for work by contract documents, to be conducted by the landscape architect or owner's representative on-site and in the presence of the landscape contractor for the purpose of acceptance.
 - Final warranty inspection: The landscape contractor shall conduct a final inspection with the owner or owner's representative at the end of the one year period.
- 1.12 WARRANTY
- The standard warranty is for one (1) year period, excluding bulbs and annuals, commencing on the date of initial acceptance. All plants shall be alive and in satisfactory growth at the end of the guarantee period.
 - Any material that is 25% dead or more shall be considered dead and must be replaced at no cost. A tree shall be considered dead when the main leader has died back, or 25% of the crown is dead.
 - Perennials shall be guaranteed for one year after initial acceptance.
- 2.0 PLANT MATERIALS
- 2.1 SCOPE OF WORK
- The landscape contractor shall be responsible for furnishing and installing all plant material shown on the drawings and plant list.
- 2.2 INSPECTION
- Plants shall be subject to inspection and approval by the owner or owner's representative at the place of growth (before digging - trees) or holding yard (shrubs) for conformity to specification requirements as to quality, size, and variety.

3.0 PRODUCTS

3.1 QUALITY ASSURANCE

3.2 ORGANIC MATTER

3.3 TOPSOIL

3.4 BACKFILL MIXTURE

3.5 MULCH

4.0 PLANTING PROCEDURE FOR TREES

4.1 TREE PLANTING

5.0 PLANTING PROCEDURES FOR SHRUBS

5.1 PLANTING SHRUBS

6.0 PLANTING PROCEDURES FOR GROUND COVER, PERENNIALS AND ANNUALS

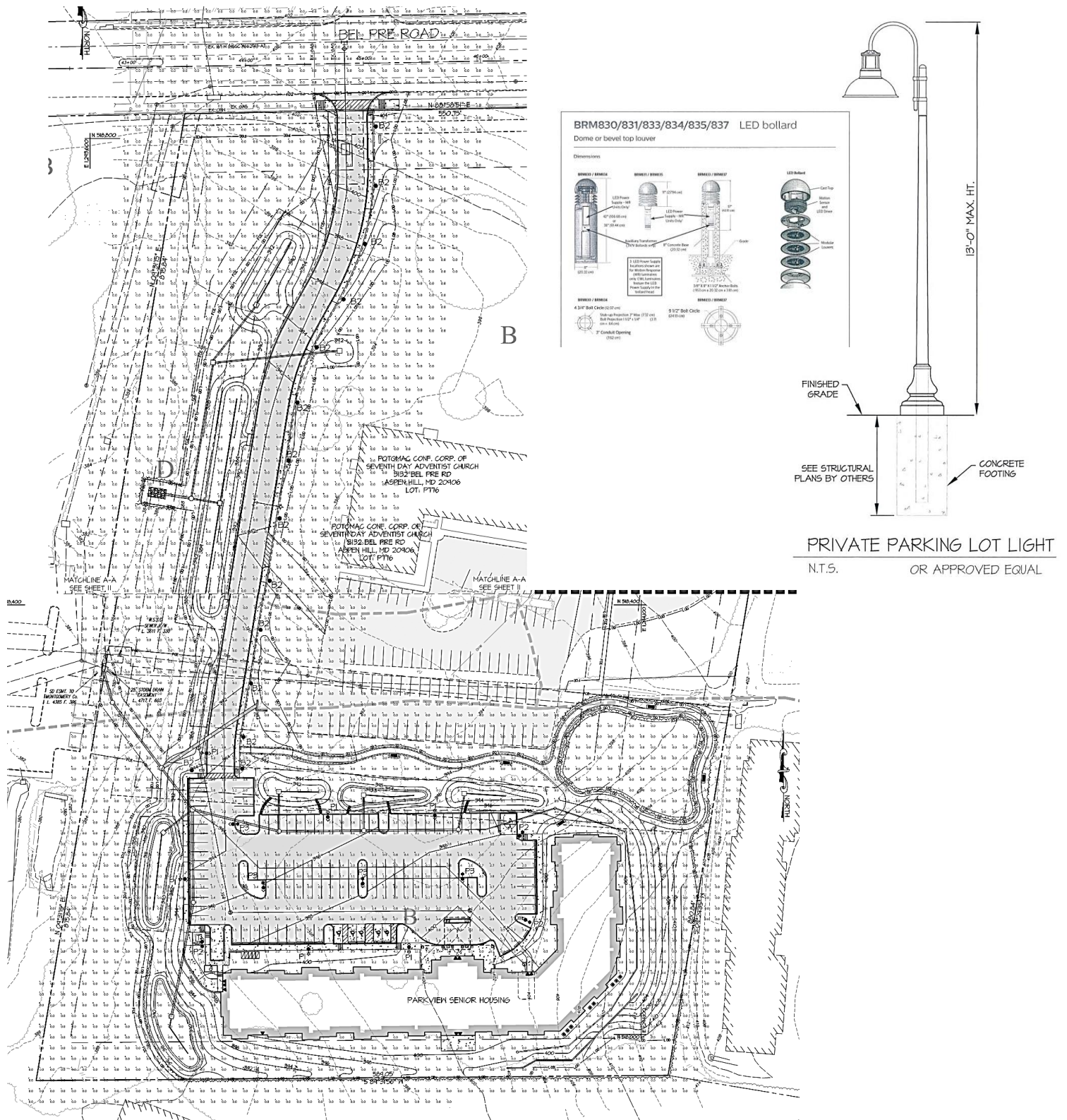
6.1 PLANTING GROUND COVER, PERENNIAL AND ANNUAL BEDS

Technical Staff describes the proposed landscaping in its report (Exhibit 28, p. 10):

The Applicant plans to retain most of the existing tree stand along the western Property boundary. Landscape plantings are proposed around the building, parking lot, and walking trail, and a retaining wall will be constructed between the building and the eastern property line. Afforestation plantings are proposed adjacent to existing tree stands on the eastern and western sides of the Property. The Applicant informed Staff that the portion of the removed driveway that is not planted with forest will likely be replanted with grass.

Applicant's land planner, Kevin Foster, who is also an expert in landscape architecture, testified that the Applicant did a "great job" of siting the proposed building and buffering it with landscaping. Tr. 82.

(Exhibits 37(k) and (l)), which the Hearing Examiner has stitched together below:



Luminaire Schedule								
Project: Parkview at Aspen Hill								
Symbol	Qty	Label	Description	Arrangement	LLF	Lum. Lumens	Lum. Watts	BUG Rating
☆	6	P1	DMS50-90W80LED4K-R-LE3F - 12' POLE	SINGLE	0.912	9626	87.8	B3-U0-G2
★	3	P2	DMS50-90W80LED4K-R-LE4F - 12' POLE	SINGLE	0.912	8915	87	B2-U0-G2
☆	4	P3	DMS50-90W80LED4K-R-LE5F - 12' POLE	SINGLE	0.912	8851	87	B3-U0-G2
●	14	B2	BRM830-CW-360-BRP @ 3.5'	SINGLE	0.912	718	41	B1-U2-G1

Permissible lighting levels for a conditional use are specified in Zoning Ordinance §59.

6.4.4.E., which provides,

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

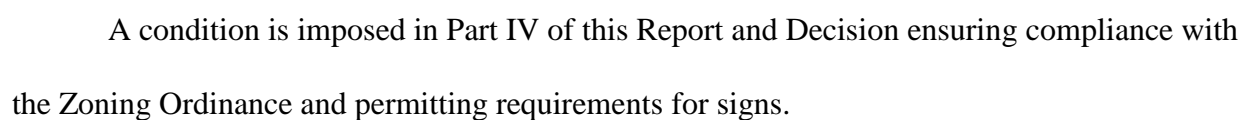
Although Technical Staff indicates that none of the lot lines of the conditional use site abut a lot with a detached house (Exhibit 28, p. 26), the Hearing Examiner notes that the pastor's existing residence will remain in an abutting lot, after subdivision. Nevertheless, the Hearing Examiner's own inspection of the photometric plan reproduced above demonstrates that the lighting from the subject site will not exceed the statutory standard of 0.1 foot-candles along the abutting property line; nor, it appears, will it exceed that standard on any lot line. Technical Staff agreed, stating (Exhibit 28, p. 29), "As demonstrated on the photometric plan, lighting for the project will be 0.0 footcandles at all property lines, so light associated with the facility will not create a nuisance to neighbors."

Technical Staff's review of the lighting levels also found that the grounds will be adequately lit (Exhibit 28, p. 10):

Proposed lighting is designed to ensure safety while limiting illumination at the Property line. Thirteen luminaires on twelve-foot poles will be located in front of the building and throughout the parking lot. Fourteen dome louvers are proposed to illuminate the sidewalk adjacent to the driveway.

c. Signage:

The Applicant proposes two monument signs for the subject site, one at the Bel Pre Road entrance to the site (measuring about 35 square feet) and the other at the entry to the proposed



⁸ The Hearing Examiner converted Technical Staff's dimensions in inches to approximate sign areas in square feet.

3. Operations

The Applicant detailed the anticipated operations for the proposed facility in its aptly named Statement of Operations (Exhibit 6). The facility will be managed by Pennrose Management Company (PMC), a real estate management firm which provides management services exclusively for properties developed by Pennrose Properties, LLC. PMC currently has 153 properties containing 9,385 units under management. PMC participates in Pennrose's development, from concept to planning, through design and development, and into construction of the housing units, before assuming any management responsibility in the operation of the units. Exhibit 6, p. 1. Proposed operations are described in the Statement, as follows:

1. Employees. The community will employ a total of 2 full time employees and 2 part time employees. One managerial employee will work on-site full time⁹ and another part time, typically during the hours of 8:30 a.m. to 5:30 p.m. One maintenance employee will work on-site typically during the hours of 8:00 a.m. to 5:00 p.m. The Property Manager will oversee all the day to day operations including collecting rents, signing leases, completing recertifications, providing excellent customer service and leading the other onsite employees. . . .
2. Scheduled Transportation. The community will arrange transportation via an approved transportation provider for off-site excursions, including shopping, medical appointments, and social events. This is detailed more specifically below in the Supportive Services portion of this statement.
3. Programs/Events Offered. The community will offer a variety of programs important to our senior population. These will include monthly health and wellness events such as blood pressure testing or flu vaccination clinics and financial courses such as budget counseling, financial literacy and fraud prevention. We will also link to programs that provide supplemental meals and will have safety courses as one of our programs. The residents will be asked to start a resident council with the support of the community. We will have holiday specific events and other fun events that the residents prefer (ice cream socials, movie night, fitness classes, walking club, etc...).
4. Waste Collection & Recycling. A dumpster will be located to the east of the building, allowing for waste storage and collection to occur in that area. The dumpster will be emptied approximately twice per week.

⁹ "Full time" does not mean "at all times." The Applicant indicated there will be no staff on site in the evening. Tr. 27.

5. Generator. An emergency power generator will be provided for the building and will be located below grade.
6. Grounds keeping & Maintenance. The community will have a maintenance supervisor, as mentioned above, who will take care of the building and the grounds. They will also contract with a landscaping company for the routine maintenance and upkeep of the property exterior.
7. Parking. Parking will be available onsite for both residents and visitors.
8. Amenity Spaces. Aspen Hill will have several amenity spaces that will be used both for day to day activities as well as organized activities and for services. These spaces will be: Game Room, Cyber Café, Salon and Fitness Center. The residents of Aspen Hill will be surveyed to identify how they would like to use these spaces. We expect to have both personal use and class options in the Cyber Café and Fitness Room. We expect to have game nights, community puzzles and bingo. The salon will house services provided by a local servicer at a rate considered reasonable compared to the market.

Supportive Service Department Mission Statement:

To ensure a successful living experience for all residents of Pennrose managed properties by providing access to and assistance in securing necessary supportive services which enhance the quality of their lives. Beyond large scale supportive service initiatives are the everyday connections needed by our residents.

These connections are achieved by advocating on behalf of the residents and linking them to appropriate service provider agencies and services. Our objective is to provide services that help maintain and prolong the residents' ability to live independently and improve self-esteem, self-sufficiency and self-empowerment, both as individuals and as a community. Additionally, by working proactively with the site staff, we strive to alleviate certain issues most common to affordable housing; such as high turnover, rent- delinquencies, property damage, vacancy losses and evictions; thereby improving overall property operation through enhanced resident relations and stronger fiscal operations.

The Senior Connection:

To further our mission of creating quality communities, Pennrose Management Company will partner with The Senior Connection, a nonprofit organization dedicated to providing programs and services that preserve and foster independence, mobility and quality of life for seniors. The Senior Connection has committed to provide valuable transportation resources to assure that residents are connected to off-site services they need and desire. In addition, The Senior Connection will serve in a consultative capacity to connect residents to additional area service providers as needed.

The Senior Connection will also provide a grocery shopping program and assistance with activities of daily living such as managing bills and household paperwork, which is often something with which seniors struggle. The Senior Connection develops a relationship with their clients and can advise or assist if any issues or concerns are noticed. The volunteers at The Senior Connection will be trained to spot and report any red flags. Thus, proper referrals can be made and seniors can safely remain in their homes.

* * *

In addition to the services listed above, the Statement of Operations (Exhibit 6, pp. 3-6) details a number of transportation options, medical and legal services and various programs that will be offered to residents of Parkview at Aspen Hill through arrangements with other organizations. There will also be a Supportive Service Coordinator on site at Parkview at Aspen Hill 20 hours per week. The Supportive Services Coordinator position will identify, develop, manage and coordinate the day-to-day services for the residents.

D. Environmental Issues

Examination of environmental impacts begins with the Applicant's Natural Resources Inventory/Forest Stand Delineation (NRI/FSD) No. 420162110 (Exhibit 13), which was approved by the Technical Staff on July 19, 2016 (Exhibit 13(a)). It describes the existing environmental site conditions. There are no unresolved environmental issues in this case.

As confirmed by Staff (Exhibit 28, p. 17), "No streams, wetlands or their buffers, steep slopes associated with a stream buffer, or known habitats of rare, threatened or endangered species are present [and the] property drains to the Rock Creek watershed, which is not in a Special Protection Area or Primary Management Area." The Applicant was required to submit both a Preliminary Forest Conservation Plan (PFCP) and a Stormwater Management Concept Plan (SWMCP), which are discussed separately below.

1. Forest Conservation

Technical Staff reports that there is an existing forested area of 0.46 acres on the subject site, and the site also contains a number of specimen-size trees. Exhibit 28, p. 17. The Applicant submitted a Preliminary Forest Conservation Plan (PFCP) No. CU 17-04 (Exhibit 30(d)) and a tree variance associated with the conditional use application (Exhibit 26(d)).

As noted by Staff (Exhibit 28, p. 13), the Applicant plans to preserve existing tree stands, manage invasive species, and plant forest on site. The Preliminary Forest Conservation Plan indicates 0.31 acres of forest retention, 0.9 acres of afforestation, and 0.80 acres of tree save area afforestation, as well as invasive species management. Staff confirmed that the PFCP “is in conformance with the Environmental Guidelines.” Exhibit 28, p. 17. Both the PFCP and the tree variance were approved by the Planning Board on December 1, 2016 (Exhibit 29, p. 2). Approval of the PFCP demonstrates compliance with the requirements of Chapter 22A, Forest Conservation.

2. Stormwater Management

There is currently no stormwater management on site. The Applicant has filed a Stormwater Management Concept Plan (SWMCP- Exhibits 15(a)-(f)), and it is pending approval before the Department of Permitting Services. That approval will be required before a Preliminary Plan of Subdivision can be approved by the Planning Board. Tr. 61. Technical Staff notes that (Exhibit 28, p. 12):

The proposed project will result in significant improvements to the Property’s stormwater management capabilities, as none is currently provided on-site. A Stormwater Management Concept Plan was submitted concurrently with the application, and stormwater management facilities for the proposed development will need to comply with the Maryland Department of the Environment’s Environmental Site Design criteria to the maximum extent practicable.

Applicant’s civil engineer, Todd Reddan, testified that the proposed stormwater facilities will meet all state and county requirements. Tr. 60-61.

Technical Staff concluded (Exhibit 28, p. 27):

By retaining existing tree stands, planting forest onsite, and improving the Property's stormwater management capabilities, the project will be in substantial conformance with the environmental recommendations of the [Master] Plan.

The Applicant's expert engineering evidence was unrefuted at the hearing. Based on that evidence and Technical Staff's approval of the amended plans, the Hearing Examiner finds that the proposed development will not harm the environment.

E. Community Response

There has been no response from the surrounding neighborhood regarding this proposal either to OZAH or to Technical Staff. Exhibit 28, p. 18.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific to a particular type of use, as set forth in Article 59.3 of the Zoning Ordinance, and general (*i.e.*, applicable to all conditional uses), as set forth in Division 59.7.3 of the Zoning Ordinance. The specific standards applied in this case are those for an Independent Living Facility for Seniors or Persons with Disabilities. *Section 59.3.3.2.C.2.b.*

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (*Zoning Ordinance*, §7.1.1.), the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, will satisfy all of the specific and general requirements for the use.

A. Necessary Findings (Section 59.7.3.1.E)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing

Examiner's findings for each standard, are set forth below:¹⁰ The major topics of discussion are further divided under the following headings:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Conclusion: It is undisputed that there have been no applicable previous approvals on the subject site (Exhibit 3, p. 16 and Exhibit 28, p. 18), and therefore this provision is inapplicable.

b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;¹¹

Conclusion: This subsection requires an analysis of the standards of the RE-2 Zone contained in Article 59-4; the use standards for an Independent Living Facility for Seniors or Persons with Disabilities contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 28, p. 30), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

¹⁰ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

¹¹ The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

1. Substantial Conformance with the Master Plan

c. substantially conforms with the recommendations of the applicable master plan;

The property lies within the geographic area covered by the 1994 Aspen Hill Master Plan. Applicant's land planner, Kevin Foster, testified at the hearing that the proposed development would conform to the recommendations of the Master Plan. Tr. 79-86. He also discusses this issue extensively in his Land Use Report. Exhibit 3, pp. 5-8. While noting that the Aspen Hill Master Plan is 22 years old and therefore the specifics have become less relevant over time, he concludes, "Nonetheless, many of the overarching objectives of the Plan remain relevant today and the proposed Project substantially conforms with many of these objectives." Exhibit 3, pp. 5-6. Applicant's Land Use Report observes that three areas of the Master Plan are relevant to this application – a. The Goal of Increased Housing Resources in Support of Housing Policies (MP p. 29); b. Recommendations for Special Exceptions (MP pp. 80-81); and c. Recommendations to preserve Environmental Resources (MP pp. 120-121).

The Applicant's Land Use Plan mentions that the Master Plan emphasizes the need to increase housing resources in support of the Montgomery County housing policies. MP p. 29. The County's housing policy recommends expanding the supply of affordable rental senior housing, and the proposed development will provide 108 affordable rental units that will serve the existing senior population within the Aspen Hill area and the county as a whole, which is clearly in furtherance of the county's housing policies.

The Master Plan's recommendations for special exceptions discourage large-scale *institutional uses* near the intersection of Homecrest Road and Bel Pre Road and seek to "avoid excessive concentrations of special exception and other nonresidential land uses along major highway corridors." MP pp. 80-81. Mr. Foster notes that the proposed use is residential, not

institutional, and that the Master Plan does not characterize Bel Pre Road as a major highway corridor, but rather an arterial roadway. Moreover, the proposed Project will be setback significantly from Bel Pre Road and will be largely screened from view by the existing church.

With regard to the environment, the Master Plan (MP pp. 120-121) seeks to reduce property damage and erosion through stormwater management, respect stream buffers and preserve forest cover. As noted by Mr. Foster, the proposed development will result in significant improvements to the treatment of stormwater management by meeting current Environmental Site Design (ESD) requirements, where there currently is no stormwater management provided on-site. Moreover, the proposal will preserve existing trees on-site, including the existing tree stands along the western property boundary and other significant trees in the central portion of the property.

Technical Staff also extensively discusses the Aspen Hill Master Plan in its report (Exhibit 28, pp. 11-14). Staff notes that the Master Plan does not specifically address the subject site, “but general recommendations related to housing, the environment, and special exceptions are relevant to this Application.” Staff’s review covers essentially the same points discussed by the Applicant’s Land Use Report, but does add two additional points – that the Master Plan seeks to protect and reinforce the integrity of existing residential neighborhoods and that it seeks to minimize uses that might diminish the safety and reduce the capacity of the roadway by creating too many access points and conflicting turning movements.

With regard to preservation of residential neighborhoods, Technical Staff finds that “The proposed independent living facility will be consistent in character with the existing three- to four-story residential multi-unit buildings that abut the Property, thus maintaining the pattern of development in this part of the neighborhood.” Exhibit 28, p. 11. With regard to road access, Staff finds, “The proposed conditional use will not increase the access points on Bel Pre Road.

The existing driveway will be removed and a new driveway will be constructed on the western side of the property. The number of access points will remain unchanged.” Exhibit 28, p. 14.

Technical Staff concludes that (Exhibit 28, p. 27):

. . . the proposed independent living facility substantially conforms with the housing, special exception, and environmental recommendations of the 1994 Aspen Hill Master Plan. The independent living facility will increase a needed type of housing in the Plan area by providing 108 affordable living units for seniors. By retaining existing tree stands, planting forest onsite, and improving the Property’s stormwater management capabilities, the project will be in substantial conformance with the environmental recommendations of the Plan.

Conclusion: The Hearing Examiner agrees with Staff’s findings and those of Mr. Foster. There is no contrary evidence in this case, and based on this record, the Hearing Examiner finds that the proposed use substantially conforms with the recommendations of the 1994 Aspen Hill Master Plan.

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Conclusion: This provision is a mix of Master Plan analysis and compatibility considerations. The Master Plan issues have been discussed in connection with the previous provision, and the Hearing Examiner concluded that the proposed use substantially conforms to the Master Plan’s recommendations. Compatibility is a question that crosses a number of topics, including the nature of the surrounding uses; any potential adverse impacts; the design of the proposed building, including its height, density and architecture; traffic generation; and other issues to be discussed extensively in other sections below.

The Hearing Examiner agrees with Technical Staff’s conclusion regarding this provision (Exhibit 28, p. 27):

The proposed building is consistent with the scale and character of the three and four story multi-unit buildings that surround the Property. The proposed setbacks, perimeter landscaping, and retained tree stands will provide an appropriate buffer

between the proposed buildings and the adjacent multi-unit buildings. The building will employ architecture that is residential in nature that will minimize the perceived bulk and massing of the building. Further, the facility and associated parking area will be largely screened from view from Bel Pre Road, and thus will not alter the character of the surrounding neighborhood.

The addition of the proposed use would not be “alter[ing] the character of the surrounding neighborhood,” which is the question posed by this provision. Clearly, the proposed use would be harmonious with the surrounding apartment complexes. Impacts on traffic volume will be discussed in Part III.A. 2., below. Based on this record, the Hearing Examiner finds that the proposed use will be harmonious with the neighborhood.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Conclusion: As discussed on page 9 of this Report and Decision, the Neighborhood is predominantly residential, with detached houses, townhouses and 3-4 story multi-unit (garden house apartments), as well as a number of institutional and residential special exceptions. As outlined by Technical Staff (Exhibit 28, p. 27):

Several other existing and approved conditional uses (special exceptions) operate in Residential Detached zones within the staff defined Neighborhood, including another independent living facility, Aspenwood Senior Living. The other residential facility in the Neighborhood, Genesis Healthcare, offers care beyond the level offered by an independent living facility. Two of the conditional uses, the Moose Lodge and the Winchester School, are nonresidential, but they have been deemed compatible in their respective locations. The proposed use will not increase the number, intensity or scope of conditional uses to such a degree that the area will be adversely affected. The proposed use is residential in nature and, as such, will not alter the predominately residential nature of the area. The proposed facility will increase the housing diversity in the area and it will offer affordable units, including units for very low-income residents. As described on page 11 of [the Technical Staff] report, the conditional use substantially conforms with the recommendations of the Master Plan, and thus does not alter the nature of the area.

The Hearing Examiner finds that the proposed use will not increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. As noted by Staff, the proposed use is residential in nature and, as such, it will not alter the predominately residential nature of the area. Moreover, as specified in the last clause of the provision, “a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area.”

2. Adequate Public Services and Facilities

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Conclusion: According to the statutory provisions quoted above, the Hearing Examiner is not required to make a finding regarding the adequacy of public services and facilities (APFO) in this case because a preliminary plan of subdivision will be required. It is thus the Planning Board that is charged with the responsibility of making the appropriate APFO findings.

Technical Staff so noted in their report (Exhibit 28, p. 28):

If the conditional use is approved, a preliminary plan of subdivision will be required to subdivide the parcel into two lots. As such, the Planning Board will determine if Adequate Public Facilities exist to support the proposed use of the Property as an assisted living facility. The Hearing Examiner is not required to assess the adequacy of the public facilities as part of this Application, but a preliminary assessment by Staff indicates that the proposed development will be served by adequate public services and facilities.

Nevertheless, traffic and storm drainage issues can have impacts on compatibility with the neighborhood, and thus some discussion of those issues is warranted. Stormwater management was discussed in Part II.D.2 of this Report and Decision, and as noted there, the proposed development will provide fully compliant stormwater management facilities, meeting Environmental Site Design (ESD) standards, on a property where no stormwater control currently exists. It will therefore significantly improve storm drainage on the subject site.

With regard to traffic impacts, the Applicant's traffic engineer, Christopher Kabatt, did both an initial traffic statement (Exhibit 9) and subsequently, a full traffic study in accordance with the Planning Board's Guidelines for Local Area Transportation Review (LATR). *See* Exhibit 38.

In his Traffic Statement (Exhibit 9), Mr. Kabatt indicated that, based on the Trip Generation Manual, 9th Edition published by the Institute of Transportation Engineers (ITE), the proposed development of 120 dwelling units will generate 24 AM peak hour trips (8 in and 16 out), and 30 (16 in and 14 out) PM peak hour trips. A full LATR traffic study was also called for because the increase in site-generated peak-hour trips will be 30 or more during the weekday evening peak hour. Mr. Kabatt also noted that Transportation Policy Area Review (TPAR) is required for developments that are projected to generate three (3) or more peak hour trips.

According to the current TPAR results, the Aspen Hill policy area is inadequate under the Roadway Test and adequate under the Transit Test. Therefore a payment will be required for the market rate units of the independent living facility. Trips generated by the moderately priced dwelling units that are exempt from paying a development impact tax are exempt from any TPAR payment. The payment will be

calculated based on 25 percent of the transportation impact tax for multi-family senior residential housing. Exhibit 9, p. 2.¹²

In his LATR Traffic Study (Exhibit 38), Mr. Kabatt reviewed the critical lane volumes (CLVs) that would be generated the existing and proposed site driveways and at nearby intersections (Bel Pre Road’s intersections with Connecticut Avenue, Homecrest Road and Beaverwood Lane), as required by a scoping agreement with Technical Staff. The results of the study are indicated below in a Table from the Staff report (Exhibit 28, p. 17), which mirrors the results table on page 27 of the traffic study (Exhibit 38):

Studied Intersection	Traffic Condition					
	Existing		Background		Total	
	AM	PM	AM	PM	AM	PM
Connecticut Avenue & Bel Pre Road	1,126	916	1,147	959	1,154	967
Bel Pre Road & Winchester School [Proposed Site Driveway]	808	670	824	705	835	726
Bel Pre Road & Existing Site Driveway	774	656	790	691	791	692
Bel Pre Road & Homecrest Road	868	742	886	776	888	779
Bel Pre Road & Beaverwood Lane	644	665	659	700	661	703

These results are then compared to the congestion standard of 1,475 CLV for the Aspen Hill Policy Area. As confirmed by Technical Staff, “all calculated CLV values are below the CLV standard of 1,475 for the Aspen Hill Policy Area, and, therefore, the LATR test is satisfied.” Exhibit 28, p. 7.

¹² Interestingly, Technical Staff seemed to conclude that no TPAR payment would be due (Exhibit 28, p. 17): “Currently, under the 2012-2016 Subdivision Staging Policy, the Transportation Policy Area Review (TPAR) test is satisfied because affordable housing is exempt from making a TPAR payment.” The question of what if any TPAR payment is due will be determined by the Planning Board at Subdivision.

The Hearing Examiner also asked both Technical Staff and the Applicant what, if any, changes in this analysis would be required if the application for subdivision is not filed until after the January 1, 2017 effective date of the new 2016-2020 Subdivision Staging Policy (SSP).

Exhibit 32. Mr. Kabatt testified at the hearing that the new SSP would require no changes in his analysis because the number of projected trips and the projected CLVs from the development would not reach the thresholds set in the new SSP for invoking analysis beyond the CLV analysis already applied to this case. Tr. 136-140. Technical Staff agreed with this conclusion in a supplemental report (Exhibit 42).

The clear weight of the evidence, as evaluated by the Applicant's transportation expert and by Technical Staff, is that the proposed use will not create traffic volumes that exceed the CLV standard for the area at the studied intersections. Moreover, Staff's preliminary assessment of the proposed development indicated that "the proposed development will be served by adequate public services and facilities" (Exhibit 28, p. 28), and there is no contrary evidence in this record. Based on this record, the Hearing Examiner finds that the proposed development will not produce demands on public facilities that will create compatibility problems or undue harm to the neighborhood.

3. No Undue Harm from Non-Inherent Adverse Effects

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use on nearby properties and the general neighborhood. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.”

Zoning Ordinance, §1.4.2. Inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects are a sufficient basis to deny a conditional use, alone or in combination with inherent effects, if the harm caused by the adverse effects would be “undue.”

In the subject case, Technical Staff listed the following physical and operational characteristics that are necessarily associated with (*i.e.*, inherent in) an Independent Living Facility for Seniors or Persons with Disabilities (Exhibit 28, p. 28):

- (1) buildings and related outdoor recreational areas or facilities;
- (2) parking facilities;
- (3) lighting;
- (4) vehicular trips to and from the site by employees, visitors, residents, delivery vehicles and waste removal;
- (5) noise generated by equipment for the facility, waste pick-up, deliveries, and occasional outdoor activities of residents and their visitors; and
- (6) driveway impacts.

Applicant’s land planner, Kevin Foster, testified that in his expert opinion, the proposed developments would produce no non-inherent adverse effects. Tr. 104-105. Staff also found that the proposed use would not create any non-inherent adverse effects (Exhibit 28, p. 28):

Non-inherent adverse effects may result from a situation unique to the physical location, operation, or size of a proposed use. Staff has not identified any non-inherent adverse impacts from the proposed use.

The Hearing Examiner agrees with the conclusion of Staff and Mr. Foster. There is nothing in this record indicating that the proposed facility would differ significantly in structure, façade, location, site design, operations or relationship with the surrounding neighborhood so as to distinguish its expected effects from those that would be typical of (*i.e.*, inherent in) this type of independent living facility for seniors or persons with disabilities. The absence of non-inherent adverse effects makes this provision inapplicable because it requires further analysis of potential harm only when at least some non-inherent adverse effect is anticipated.

Moreover, even if there were some indication of non-inherent adverse effects, the Hearing Examiner would have to assess whether any potential harms would actually occur, and if so, whether they would result, at least in part, from the identified non-inherent adverse effects. If both of these questions were answered in the affirmative, the Hearing Examiner would then determine whether any of these purported harms are “undue” within the meaning of the Zoning Ordinance.

Technical Staff addressed the question of “undue harm” in its report (Exhibit 28, pp. 28-29):

There is no expected undue harm to the neighborhood because of any non-inherent adverse effect, or a combination of inherent or non-inherent adverse effects. The proposed independent living facility will not disturb the use, peaceful enjoyment, economic value, or development potential of abutting and confronting properties or the general neighborhood. The proposed building and site have been designed to be compatible with the surrounding residential neighborhood. The proposed building is similar in scale and appearance to the surrounding multi-unit buildings. The residential architecture, large building setback, and screening will ensure that the proposed facility will not disturb the use or peaceful enjoyment of neighbors, nor will it decrease the economic value or development potential of abutting and confronting properties or the general neighborhood.

The proposed facility will not cause undue harm to the neighborhood as a result of traffic, noise, odors, dust, illumination, or a lack of parking. The Applicant’s Traffic Study indicates that the Critical Lane Volumes (CLV) at surrounding intersections do not exceed the CLV standard of 1,475 for the Aspen Hill Policy Area and that the roadway network is adequate to accommodate the proposed use. Any noise,

odors, or dust associated with the facility will be similar to those generated by similar facilities. Noises associated with the proposed facility will be minimized by the site design. The generator will be located within a self-attenuating container. The dumpster will be located in the front of the parking lot, over 180 feet from the nearest property line, and a recommended condition of approval prohibits waste pick-up in the evenings. The outdoor recreation areas for residents and visitors are unlikely to generate noises objectionable to the neighbors. As demonstrated on the photometric plan, lighting for the project will be 0.0 footcandles at all property lines, so light associated with the facility will not create a nuisance to neighbors. The facility will provide sufficient parking considering the number of units available to very low income residents. As previously discussed, a shuttle service will also be offered to residents, and a Ride On Bus stop is located just to the west of the Property's driveway.

There will be no undue harm to the health, safety, or welfare of neighboring residents, visitors, or employees because the proposed Conditional Use meets all applicable development standards, and has adequate and safe circulation in and around the site.

The Hearing Examiner agrees with Staff's analysis. He finds no evidence in this record of potential undue harm to the neighborhood from any of the categories of harm listed in Zoning Ordinance §59.7.3.1.E.1.g.

4. Compatibility with the Neighborhood

Section 59.7.3.1.E.2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: Zoning Ordinance §59.7.3.1.E.2. requires an examination of the compatibility of the use with the character of the residential neighborhood in which it is located. This question is similar to the one raised by Zoning Ordinance §59.7.3.1.E.1.d., above, which asked whether the proposed use will be harmonious with the neighborhood or would alter its character. In response to that question, the Hearing Examiner found that the proposed use would not alter the character of the neighborhood, considering the surrounding apartment complexes in the immediate vicinity of the subject site.

Applicant's architect and its land planner both addressed the question of compatibility at the hearing. Ms. Miller testified that in a project like this where there is a conditional use, she visits the site and evaluates the areas adjacent to the site. She looks for "contextual materials" and "contextual size elements to make sure [the proposed building will be] compatible with the adjacent surroundings. And then we also look at how the building is going to be used as to where to place it, . . . facing back here to the rear of the site. And as far as the parking, . . . we felt that that [locating the parking adjacent to the church parking] made the most sense in compatibility. . ."

Tr. 122-123. With regard to her design of the proposed building, Ms. Miller testified (Tr. 113):

As you can see in this rendering, it's a four story building, peaked roofs, siding, brick, and, you know, traditional windows, which are very compatible with the area. And in my visits to the site, you know, adjacent to it are multi-family projects three and four stories of similar scale and architectural design. . . . [we] felt that it made the most sense to put it exactly where it was to provide the buffering of the adjacent properties and, you know, keeping it 600 plus feet from the main road. We also tried to use similar materials. There is a fair amount of brick in the area; a fair amount of siding. So we did that as well as the peaked roofs are very compatible.

Mr. Foster testified that the way Applicant sited the building, using the building for the majority of screening of the parking area from the surrounding buildings, with additional buffering on the sides, maximizes compatibility. In his opinion, the Applicant's Conditional Use Plan, as now proposed, will be compatible with the surrounding area. Tr. 84.

Technical Staff agreed, stating (Exhibit 28, p. 29):

. . . The proposed building will be compatible with the character of the surrounding residential neighborhood. The building's scale, height, and residential style architecture will be consistent with the residential character of the nearby multi-unit buildings. The view of the facility from Bel Pre Road will be obscured by the 640-foot setback from the road right-of-way and the existing church. Retained tree stands and additional landscape plantings will buffer the proposed building from the adjacent multi-unit buildings.

The Planning Board also concluded that "the proposed facility will be operated without detriment to the neighborhood . . ." Exhibit 29.

Based on this record, the Hearing Examiner finds that the proposed use, an Independent Living Facility for Seniors or Persons with Disabilities, designed as it is with residential style architecture and appropriately screened, will be compatible with the character of the surrounding neighborhood.

Section 59.7.3.1.E.3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and with the conditions imposed, meets the standards required for approval.

B. Development Standards of the Zone (Article 59.4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the RE-2 Zone, contained in Article 59.4 of the Zoning Ordinance. Staff included a table comparing the minimum development standards of the RE-2 Zone to what is provided in the conditional use site plan. Ex. 28, p. 22. Since the proposed area of the subject site, the proposed height and the proposed lot width at the street were modified at the hearing, as reflected in the corrected conditional use plan cover sheet (Exhibit 46), the Hearing Examiner adjusted the relevant figures in Staff's Table, reproduced below, to reflect the changes.

The changes to the Table include the lot area; the lot width at the front lot line; the proposed height; the density; and the percent of lot coverage. The new figures are taken from the Zoning Standards Table on Applicant's corrected and revised Conditional Use Site Plan, and have been approved by Technical Staff (Exhibit 44). It should be noted that the change in lot area also produces a change in the percentage of green area, but that standard (a minimum of 70%) is established by §59.3.3.2.C.2.b.viii. for this conditional use, not in the Zone standards of Division 59.4. Therefore, it will be discussed below in Part III.C. of this Report and Decision.

Section 4.4.4.B. RE-2 Zone, Standard Method Development Standards*

	Required / Allowed	Proposed
1. Lot and Density		
Lot (min)		
Lot area	2 acres	5.68 acres
Lot width at front building line	150 feet	582 feet
Lot width at front lot line	25 feet	122 feet
Frontage on street or open space	Required	Frontage on Bel Pre Road Provided
Density (max)		
Density (units/acre)	1 unit per 2 acres is specified for the RE-2 Zone, but the maximum density for this kind of CU is determined by Section 3.3.2.C.2.b.iv	Density to be provided is 120 units on 5.68 acres of land (21.13 units per acre), which is permissible under Section 3.3.2.C.2.b.iv
Coverage (max)		
Lot	25%	12%
2. Placement		
Principal Building Setbacks (min)		
Front setback	50 feet	640 feet
Side setback	17 feet (25 feet)**	62 feet east; 153 feet west
Sum of side setbacks	35 feet	215 feet
Rear setback	35 feet	35 feet
3. Height		
Height (max)		
Principal Building	50 feet	50 feet

* For a “Detached House or a Building for a Cultural Institution, Religious Assembly, Public Use, or a Conditional Use allowed in the zone.”

** Side setback established by Section 3.3.2.C.2.b.vii, which requires that the minimum side setback is 25 feet or as specified by the relevant zone, whichever is greater.

Conclusion: As is evident in the above table, the application and the proposed development meet all of the applicable development standards established for the RE-2 Zone, and therefore satisfy the requirements of Division 59.4 of the Zoning Ordinance. The Hearing Examiner so finds.

C. Use Standards for an Independent Living Facility for Seniors (Section 59.3.3.2.C.2.b.)

The specific use standards for approval of an Independent Living Facility for Seniors or Persons with Disabilities are set out in Section 59.3.3.2.C.2.b. of the Zoning Ordinance.

Zoning Ordinance §59.3.3.2.C.**C. Independent Living Facility for Seniors or Persons with Disabilities****1. Defined**

Independent Living Facility for Seniors or Persons with Disabilities means a building containing dwelling units and related services for senior adults or persons with disabilities. Independent Living Facility for Seniors or Persons with Disabilities includes meal preparation and service, day care, personal care, nursing or therapy, or any service to the senior adult or disabled population of the community that is an ancillary part of one of these operations.

2. Use Standards**a. Where an Independent Living Facility for Seniors or Persons with Disabilities is allowed as a limited use, it must satisfy the following standards:**

- i. The facility must meet all applicable Federal, State, and County licensure, certificate, and regulatory requirements.*
- ii. Resident staff necessary for the operation of the facility are allowed to live on-site.*
- iii. Occupancy of a dwelling unit is restricted to the following:*
 - (a) a senior adult or person with disabilities, as defined in Section 1.4.2, Defined Terms;*
 - (b) the spouse of a senior or disabled resident, regardless of age or disability;*
 - (c) a resident care-giver, if needed to assist a senior or disabled resident;*
or
 - (d) in a development designed primarily for persons with disabilities rather than senior adults, one parent, daughter, son, sister, or brother of a handicapped resident, regardless of age or disability.*
 - (e) Age restrictions must satisfy at least one type of exemption for housing for older persons from the familial status requirements of the federal “Fair Housing Act,” Title VIII of the Civil Rights Act of 1968, as amended.*

b. Where an Independent Living Facility for Seniors or Persons with Disabilities is allowed as a conditional use, it may be permitted by the Hearing Examiner under all limited use standards, Section 7.3.1, Conditional Use, and the following standards:

- i. The site or the proposed facility has adequate accessibility to or provides on-site public transportation, medical service, shopping areas, recreation and other community services frequently desired by senior adults or persons with disabilities. The application must include a vicinity map showing major thoroughfares, public transportation routes and stops, and the location of commercial, medical and public services within a one-mile radius of the proposed facility.*

ii. The Hearing Examiner may restrict the availability of ancillary services to nonresidents and specify the manner in which this is publicized. Retail facilities may be included for the exclusive use of the residents of the building.

iii. A minimum of 15% of the dwelling units is permanently reserved for households of very low income, or 20% for households of low income, or 30% for households of MPDU income. If units are reserved for households of more than one of the specified income levels, the minimum percentage must be determined by agreement with the Department of Housing and Community Affairs under Executive regulations. Income levels are defined in Section 1.4.2, Defined Terms.

iv. The maximum building height of an Independent Living Facility for Seniors or Persons with Disabilities is 60 feet and the maximum density is determined by the Hearing Examiner under the development standards of Section 3.3.2.C.2.b.vi through Section 3.3.2.C.2.b.ix, without regard to any other limitation in this Chapter.

v. Height, density, coverage, and parking must be compatible with surrounding uses and the Hearing Examiner may modify height, density, coverage, and parking to maximize the compatibility of buildings with the residential character of the surrounding neighborhood.

vi. The minimum front setback is 50 feet. Except for an access driveway, this setback area must be maintained as green area; however, if development does not exceed the height limit of the applicable Residential zone, the minimum setback specified by the zone applies.

vii. The minimum side and rear setback is 25 feet or as specified by the relevant zone, whichever is greater.

viii. The minimum green area is:

(a) 70% in the RE-2, RE-2C, and RE-1 zone, except where the minimum green area requirement is established in a master plan;

(b) 60% in the R-200 zone; and

(c) 50% in the R-60, R-90, and Residential Townhouse zones.

ix. The Hearing Examiner may reduce the green area requirement by up to 15% if it is necessary to accommodate a lower building height for compatibility reasons.

Conclusion: It is important to note at the outset that some of the standards set forth above may change in the near future because a Zoning Text Amendment (ZTA 16-15) was introduced in the Council on November 29, 2016, and by its terms, it would:

- separate the standards for senior and disabled independent living facilities;

- revise the standards for senior and disabled independent living facilities; and
- generally amend the provisions for senior and disabled independent living facilities.

The Hearing Examiner takes official notice of this pending legislation, about which the Council held a public hearing on January 17, 2017. Prior to the OZAH hearing, the Hearing Examiner invited both Technical Staff and the Applicant to comment on the effects of ZTA 16-15 on the subject application, if the ZTA were to become law. Exhibit 34.

Technical Staff responded on December 29, 2016, in a supplemental report (Exhibit 42), stating:

If adopted, ZTA 16-15 would separate the standards for an independent living facility for seniors from a similar facility for disabled persons, and would revise the standards that dictate the occupancy limitations for each type of facility. The County Council packet dated 11/23/2016 indicates that the current occupancy standards are no longer in alignment with federal Fair Housing Act regulations, and that ZTA 16-15 is intended to correct the problem.

The ZTA would modify who could reside with a senior in the proposed independent living facility, but any discernable effects would be negligible. However, as noted by the Hearing Examiner, the language in ZTA 16-15 is inconsistent with conditions 4 and 5 in the Planning Staff report. To remedy the inconsistency, the conditions could be amended . . .

Staff suggested amending its proposed 4th condition by substituting the language, “Occupancy of the dwelling units is restricted to by Section 59-3.3.2.C.2.a.iii, as amended,” and eliminating the remainder of its proposed Condition 4, as well as all of its proposed Condition 5.

The Applicant responded in two letters (Exhibits 40 and 45). In Exhibit 40, the Applicant suggested that ZTA 16-15, if adopted, would have no limiting effect on the Conditional Use application because “ZTA 16-15 would broaden the allowable occupants.” In Exhibit 45, the Applicant stated that although it can comply the current provisions of the Code, “the revisions proposed by ZTA 16-15 provide for more flexibility in occupancy and therefore would be preferable.” The Applicant also noted that because it would have to comply with the law in any case, Conditions 4 and 5 proposed originally by Technical Staff could just be dropped, or if the

Hearing Examiner prefers to condition the occupancy requirements, the Applicant recommended that Staff's proposed Conditions 4 and 5 be replaced with a single condition which reads:

"Occupancy of the dwelling units shall be in accordance with Zoning Ordinance Section 3.3.2.C.2, and any amendment thereto."

While it is true that the Applicant would be required to follow the law in any case, the Hearing Examiner concludes that it is preferable to reference compliance with the occupancy requirements, and their possible amendment, because this case is being decided while the proposed changes to the occupancy requirements are being considered by the Council. The Applicant's formulation of a substitute condition does recognize the possibility of an amendment, and it will be imposed as a condition in Part IV of this Report and Decision in lieu of Technical Staff's originally proposed conditions 4 and 5.

The Hearing Examiner agrees with both Staff and the Applicant that nothing in the proposed changes to Zoning Ordinance Section 59.3.3.2.C.2. would appear to negatively affect the development and operation of the planned conditional use, and he therefore concludes that the subject application can be appropriately granted with a condition establishing that the use must be operated in accordance with Section 59.3.3.2.C.2., and any amendment thereto.

We now examine Applicant's compliance with the individual sections of Section 59.3.3.2.C.2., as it is presently codified.

2. Use Standards

a. Where an Independent Living Facility for Seniors or Persons with Disabilities is allowed as a limited use, it must satisfy the following standards:

i. The facility must meet all applicable Federal, State, and County licensure, certificate, and regulatory requirements.

Conclusion: Ivy Dench-Carter, the regional vice president for Penrose Properties, LLC, testified at the hearing that there is no licensing requirement for this type of facility and "This would not

be a licensed facility.” Tr. 28. However, this provision is recommended as a condition by Technical Staff, and it has been adopted by the Hearing Examiner in Part IV of this Report and Decision, so that it is clear that the conditional use holder is required to follow any applicable Federal, State, and County requirements.

ii. Resident staff necessary for the operation of the facility are allowed to live on-site.

Conclusion: The Applicant has provided testimony that there will be no staff on site in the evening (Tr. 27), but having resident staff is not prohibited by this conditional use, as long as the number of employees does not exceed four, should the operator of the facility find it necessary to have a resident employee.

iii. Occupancy of a dwelling unit is restricted to the following:

(a) a senior adult or person with disabilities, as defined in Section 1.4.2, Defined Terms;

(b) the spouse of a senior or disabled resident, regardless of age or disability;

(c) a resident care-giver, if needed to assist a senior or disabled resident; or

(d) in a development designed primarily for persons with disabilities rather than senior adults, one parent, daughter, son, sister, or brother of a handicapped resident, regardless of age or disability.

(e) Age restrictions must satisfy at least one type of exemption for housing for older persons from the familial status requirements of the federal “Fair Housing Act,” Title VIII of the Civil Rights Act of 1968, as amended.

Conclusion: As indicated at the beginning of this section, the Hearing Examiner has imposed a condition in Part IV of this Report and Decision requiring that “Occupancy of the dwelling units shall be in accordance with Zoning Ordinance Section 59.3.3.2.C.2, and any amendment thereto.” Thus, the Hearing Examiner finds that this standard has been met.

b. Where an Independent Living Facility for Seniors or Persons with Disabilities is allowed as a conditional use, it may be permitted by the Hearing Examiner

under all limited use standards, Section 7.3.1, Conditional Use, and the following standards:

i. The site or the proposed facility has adequate accessibility to or provides on-site public transportation, medical service, shopping areas, recreation and other community services frequently desired by senior adults or persons with disabilities. The application must include a vicinity map showing major thoroughfares, public transportation routes and stops, and the location of commercial, medical and public services within a one-mile radius of the proposed facility.

Conclusion: The record does include a vicinity map showing major thoroughfares, public transportation routes and stops, and the location of commercial, medical and public services within a one-mile radius of the proposed facility. Exhibit 30(e) and Attachment 3 to the Technical Staff Report (Exhibit 28). In addition, the Applicant's Statement of Operations (Exhibit 6, pp. 3-6) details a number of transportation options, medical and legal services and various programs that will be offered to residents of Parkview at Aspen Hill through arrangements with other organizations. There will also be a Supportive Service Coordinator on site at Parkview at Aspen Hill 20 hours per week. The Supportive Services Coordinator position will identify, develop, manage and coordinate the day-to-day services for the residents.

Technical Staff reports (Exhibit 28, p. 19):

The Senior Connection will offer a free shuttle service connecting residents to off-site services. The Property is also served by public transportation. Two Ride On bus routes, 26 and 49, provide service along Bel Pre Road, and a bus stop is located just west of the Property's driveway. The Applicant submitted the required vicinity map (Attachment 3) that shows the public transportation stops and routes in the area, several nearby shopping centers, and medical offices located across the street from the Property.

Staff concludes (Exhibit 28, pp. 19-20) that "The location of the proposed facility in the community and the free shuttle service ensures that residents will be able to access needed services and commercial facilities." The Hearing Examiner agrees and finds that the proposed facility has adequate accessibility to these services, or provides on-site public transportation,

medical service, shopping areas, recreation and other community services frequently desired by senior adults or persons with disabilities.

ii. The Hearing Examiner may restrict the availability of ancillary services to nonresidents and specify the manner in which this is publicized. Retail facilities may be included for the exclusive use of the residents of the building.

Conclusion: The Applicant specified in its Land Use Report (Exhibit 3, p. 8) that “All of the services offered by the Project are intended to serve only the residents.” To ensure that adequate services will be provided, the Hearing Examiner has imposed the following condition in Part IV of this Report and Decision:

The conditional use must be operated in a manner so as to provide the facilities and services to residents outlined in Applicant’s Statement of Operations (Exhibit 6). Use of the on-site facilities and services must be restricted to residents of the conditional use site, their guests and employees, and personnel providing services to the residents.

With the addition of this condition, the Hearing Examiner concludes that the residents will be provided adequate facilities and services and that the rationale for this statutory provision has been satisfied.

iii. A minimum of 15% of the dwelling units is permanently reserved for households of very low income, or 20% for households of low income, or 30% for households of MPDU income. If units are reserved for households of more than one of the specified income levels, the minimum percentage must be determined by agreement with the Department of Housing and Community Affairs under Executive regulations. Income levels are defined in Section 1.4.2, Defined Terms.

Conclusion: The Applicant specified in its Land Use Report (Exhibit 3, p. 9) that “a minimum of 15% of the dwelling units will be reserved for households of very low income, which is defined as income at or below 50% AMI [(area median income as determined annually by the U.S. Department of Housing and Urban Development)].” Technical Staff recommended a condition requiring this reservation for 15% of households with very low income (Exhibit 28, p. 20), and the Hearing Examiner has imposed that condition in Part IV of this Report and Decision. Thus,

this provision has been satisfied.

iv. The maximum building height of an Independent Living Facility for Seniors or Persons with Disabilities is 60 feet and the maximum density is determined by the Hearing Examiner under the development standards of Section 3.3.2.C.2.b.vi through Section 3.3.2.C.2.b.ix, without regard to any other limitation in this Chapter.

Conclusion: The height of the proposed building is a maximum of 50 feet, with a density of 120 units on 5.68 acres of land (21.13 units per acre). These figures were originally a maximum height of 47 feet, with a density of 120 units on 5.99 acres of land (20 units per acre), as outlined in Technical Staff's original report (Exhibit 28, p. 20). The changes were approved by Technical Staff in its Supplemental Reports (Exhibits 42 and 44). The Hearing Examiner finds that the final figures for height and density are allowed under the development standards of Section 3.3.2.C.2.b.vi through Section 3.3.2.C.2.b.ix., and thus this provision has been satisfied.

v. Height, density, coverage, and parking must be compatible with surrounding uses and the Hearing Examiner may modify height, density, coverage, and parking to maximize the compatibility of buildings with the residential character of the surrounding neighborhood.

Conclusion: Technical Staff reports (Exhibit 28, p. 20):

The proposed facility has been designed to ensure compatibility with the surrounding uses. The Property is surrounded on three sides by three and four story multi-unit apartment complexes. The height, scale, and architecture of the proposed building will be consistent with the surrounding multi-unit buildings. Parking for the proposed facility will be largely screened from Bel Pre Road by the existing Church, and from the surrounding residential buildings by existing tree stands and proposed landscape plantings.

The Hearing Examiner agrees with this assessment. As discussed in Part III.A.4. of this Report and Decision, the proposed building and parking will be compatible with their surroundings, given the way they are located, designed and screened, even with the waiver of some parking setbacks, which will be discussed in Part III.D.2., below. The Hearing Examiner finds that the requirements of this provision have been satisfied.

vi. The minimum front setback is 50 feet. Except for an access driveway, this setback area must be maintained as green area; however, if development does not exceed the height limit of the applicable Residential zone, the minimum setback specified by the zone applies.

Conclusion: As reported by Technical Staff (Exhibit 28, p. 21), “the proposed building will be set back 640 feet from Bel Pre Road. The area between the Bel Pre Road right-of-way and the 50-foot setback line is maintained as green area.” The Hearing Examiner therefore finds that this provision has been satisfied.

vii. The minimum side and rear setback is 25 feet or as specified by the relevant zone, whichever is greater.

Conclusion: As reported by Technical Staff (Exhibit 28, p. 21), and reflected in the table on page 42 of this Report and Decision,

The RE-2 zone requires a 17-foot side setback and a 35-foot rear setback, so the proposed building must have a side setback of at least 25 feet [per this provision], and a rear setback of at least 35 feet. The proposed building will provide minimum side setbacks of 62 feet (to the east) and 153 feet (to the west), and a rear setback of 35 feet.

The Hearing Examiner therefore finds that this provision has been satisfied.

viii. The minimum green area is:

(a) 70% in the RE-2, RE-2C, and RE-1 zone, except where the minimum green area requirement is established in a master plan;

* * *

Conclusion: Technical Staff reported (Exhibit 28, p. 21) that the proposed lot will be 73.3% green area; however, that figure changed when the total area of the site was reduced from 5.99 acres to 5.68 acres. According to the Applicant’s final Conditional Use Plan Cover Sheet (Exhibit 46), the green area percentage will be 71.8% with new configuration, and Technical Staff approved the new figures in its Supplemental Reports (Exhibits 42 and 44). The Hearing

Examiner finds that the final figure for percentage of green area satisfies the 70% minimum required by this provision for the RE-2 Zone.

ix. The Hearing Examiner may reduce the green area requirement by up to 15% if it is necessary to accommodate a lower building height for compatibility reasons.

Conclusion: No reduction in green area has been requested by the Applicant, and none is needed or granted by the Hearing Examiner.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Under the amendments to Section 59.7.3.1.E.1.b. of the 2014 Zoning Ordinance, effective December 21, 2015, the requirements of these sections need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.”¹³ The applicable requirements, and whether the use meets these requirements, are discussed below. Technical Staff’s report (Exhibit 28, pp. 23-27) discusses the requirements of the following Divisions of Article 59.6: Division 6.2 Parking, Queuing and Loading, Division 6.4 General Landscaping and Outdoor Lighting, Division 6.5 Screening, and Division 6.7 Signs. The proposed use and Zone do not require the review of Division 6.1 for Site Access, Division 6.3 for Open Space and Recreation, or Division 6.6 for Outdoor Storage. Nevertheless, because the site access will be changing from the current site access, the Hearing Examiner will briefly address the proposed site access below.

1. Site Access

Section 6.1.2. Applicability

Division 6.1 applies to development in the Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones if:

¹³ The 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

- A. an apartment, multi use, or general building type is proposed; and***
B. a site plan or conditional use approval is required.

Conclusion: Zoning Ordinance Division 59.6.1. governs Site Access; however, by its own terms, as stated in §59.6.1.2., Division 59.6.1 does not apply to development in single-family residential zones, such as the RE-2 Zone involved in this case. As observed by Technical Staff (Exhibit 28, 9), under Applicant’s proposal, the existing driveway will be eliminated and a new driveway, designed to serve both the existing church and the new conditional use, will be constructed:

The existing driveway to the church and detached house will be removed, and a new driveway will be constructed on the west side of the Parcel to provide access to the existing church and pastor’s residence and to the proposed assisted living facility. A proposed five-foot sidewalk along the driveway will provide pedestrian access between the independent living facility and Bel Pre Road. The proposed driveway and sidewalk will traverse the church property with an access easement for use by the independent living facility. The sidewalk to Bel Pre Road will connect with a six-foot sidewalk in front of the building and to the walking path located to the north of the proposed building. The building’s loading area will be located on the western end of the building and screened with landscaping.

Todd Reddan, Applicant’s civil engineer, testified that the access will be “compatible with fire apparatus requirements from DPS.” Tr. 53. There will also be a sidewalk along the driveway coming off of Bel Pre Road, and there will be pedestrian scale bollard lighting along the driveway. Tr. 67. Based on this record, the Hearing Examiner finds, subject to revisions at subdivision, that site access will be adequate.

2. Parking, Queuing and Loading

Conclusion: Parking, queuing and loading standards are governed by Division 6.2 of the Zoning Ordinance. For an Independent Living Facility for Seniors or Persons with Disabilities, the required number of vehicle parking spaces is based on the number of dwelling units and the maximum number of employees on a shift. The chart in Zoning Ordinance §59.6.2.4.B. calls for 1 parking space for each dwelling unit plus 0.5 spaces for each employee. Since there will be

120 dwelling units and up to 4 employees, the number of required vehicle parking spaces, without any adjustment, would be 122 ($120 + 2$). However, the Applicant argues that this figure should be reduced because at least 15% of its units would qualify as MPDUs (*i.e.*, reserved for residents with very low income, defined as at or below 50% of the area median income), and Zoning Ordinance §59.6.2.3.I.2.b allows an adjustment factor of 0.5 for MPDU and workforce housing. Technical Staff agreed with this adjustment (Exhibit 28, p. 23).

Fifteen percent of 120 units is 18 units, and if each of them requires only 0.5 parking spaces, the MPDU units would require only 9 parking spaces. Adding in 1 parking space for each of the remaining 102 units would result in a need for 111 parking spaces before adding in the 2 required employee spaces. Thus, the total of required vehicle parking spaces would then be 113, as noted in Applicant's final Conditional Use Plan Cover Sheet (Exhibit 46).¹⁴ The Applicant will provide 117 vehicle parking spaces (including 5 handicapped, 1 car-share, 1 electric ready, 1 loading space and 4 motorcycle spaces),¹⁵ and therefore will meet the Zoning Ordinance requirements for the number of spaces.

The other parking-space issue concerns bicycle parking spaces. Zoning Ordinance §59.6.2.4.C. calls for 0.25 spaces per dwelling unit, 95% of which should be long term spaces. Since there will be 120 units, 30 bicycle spaces would be required (120×0.25), and 28.5 of them (30×0.95) would need to be long term. The Applicant initially asked for a waiver of that requirement pursuant to Zoning Ordinance §59.6.2.10, reducing the numbers to 9 total bicycle parking spaces, with 5 short-term spaces and 4 long-term spaces provided in front of the building.

¹⁴ The Applicant's figures on its Cover Sheet specify 3, not 4, employees, presumably because a maximum of 3 will be on site at any time. The Hearing Examiner used 4 as the number of employees, because Applicant's Statement of Operations (Exhibit 6) calls for 4 employees (2 of whom are part time) and the Technical Staff proposed a condition limiting the number of employees to 4. Whichever way the number of employees is counted, only 2 parking spaces will be required for them.

¹⁵ As noted at the hearing (Tr. 47) and reflected in the corrected Conditional Use Plan Cover Sheet (Exhibit 46), the actual number of parking spaces proposed by the Applicant is 117, not the 115 spaces mentioned in the Staff report.

Technical Staff agreed with the waiver request, stating (Exhibit 28, p. 23):

. . . Pennrose has significant prior experience operating similar facilities and anticipates that few, if any, residents will use bicycles. The proposed facility will employ four people, and is not located near a major bicycle commuting route. As such, the demand will likely be low for the long-term bicycle parking spaces and a reduction of the number of spaces will be sufficient to provide adequate parking in a safe and efficient manner. Staff supports a parking waiver to reduce the number of long-term bicycle parking spaces from 29 to four.

The Planning Board disagreed with Staff's recommended reduction of the long-term bicycle spaces to 4, stating that “. . . at least ten long-term bicycle parking spaces should be provided so residents could safely store bicycles on the property.” Exhibit 29. The Applicant agreed to that change (Tr. 54-55), as reflected in the figures on its final Conditional Use Plan Cover Sheet (Exhibit 46), which call for 10 long-term bicycle spaces and 5 short-term spaces.

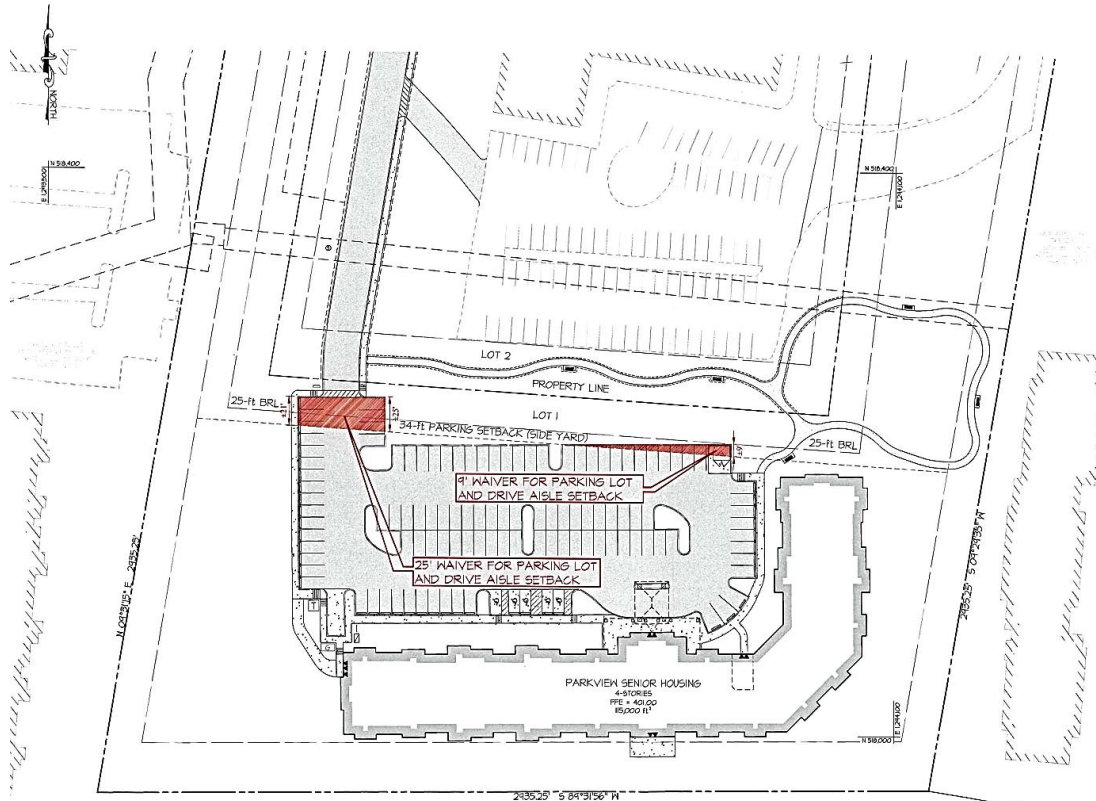
Conclusion: Based on this record, the Hearing Examiner finds that 10 long-term bicycle spaces and 5 short-term spaces is appropriate for this facility, and he hereby grants the requested waiver of Section 59.6.2.4.C., reducing the number of required bicycle spaces to 10 long-term bicycle spaces and 5 short-term spaces, in accordance with Zoning Ordinance §59.6.2.10.

As observed by Technical Staff (Exhibit 28, pp. 24-26), the proposed development will meet all the other parking standards set forth in Zoning Ordinance Division 59-6.2 (location, design, lighting and landscaping), except with regard to one of the parking setback requirements. That setback provision, Section 59.6.2.5.k.2.b., calls for a “minimum side parking setback [that] equals 2 times the minimum side setback required for the detached house.” For the reasons summarized by Technical Staff (Exhibit 28, p. 24), the Applicant cannot meet the required parking lot setback along the northern edge of the site, and is therefore requesting a waiver of that provision pursuant to Zoning Ordinance §59.6.2.10:

The minimum side setback in the RE-2 zone is 17 feet, so the minimum side parking setback is 34 feet. Because of the irregular shape of the proposed Property, the parking lot has three side setbacks (to the north, east, and west). The parking lot

is set back 93 feet from the western property line and 145 feet from the eastern property line, but a portion of the parking lot is only setback nine feet from the property line to the north, and the Applicant requests a parking waiver to reduce the parking set back from 34 feet to 9 feet along this property line. . . .

The Applicant's parking setback waiver request (Exhibit 17) attached a diagram demonstrating the situation (Exhibit 17(a)):



Applicant argued at the hearing (Tr. 56-59) and in its waiver request (Exhibit 17, p. 2) that, “The proposed Project will also satisfy the intent of the parking setbacks contained in Section 6.2.S.K, which is to maintain a residential character and a pedestrian-friendly street.” Technical Staff agreed (Exhibit 28, p. 24):

The proposed modification will only serve to reduce the parking setback between the proposed parking facility and the adjacent church parking lot, and there will be a minimum 62-foot buffer area between the two parking lots. The proposed parking lot design will satisfy the intent of maintaining the residential character and pedestrian friendly environment of the neighborhood and will provide parking in a safe and efficient manner.

Conclusion: There is no contrary evidence in the record. Zoning Ordinance §59.6.2.10 provides that “*The deciding body may waive any requirement of Division 6.2, . . . if the alternative design satisfies Section 6.2.1. . . .*” Section 6.2.1 provides that “*The intent of the vehicle and bicycle parking, queuing, and loading requirements is to ensure that adequate parking is provided in a safe and efficient manner.*” The most salient fact regarding the setback issue is that the parking lot setback in question is between two parking lots, and therefore reducing it will not adversely affect the adequacy, safety or efficiency of the parking; nor will it be detrimental to the residential character and pedestrian friendly environment of the neighborhood. Based on this record, the Hearing Examiner hereby grants the requested parking lot setback waiver of Section 59.6.2.5.K. 2.b., reducing the minimum side yard setback along the northern lot line for the parking facility to 9 feet, instead of 34 feet, in accordance with Zoning Ordinance §59.6.2.10. The Hearing Examiner also finds that the proposed development will meet all the other parking standards set forth in Zoning Ordinance Division 59-6.2.

3. Site Landscaping and Screening

Conclusion: Division 6.4 of the Zoning Ordinance sets minimum standards for site landscaping, which are intended to “preserve property values, preserve and strengthen the character of communities, and improve water and air quality.” §59.6.4.1. Section 59.5.3.A.1. provides that “*Screening is required along a lot line shared with an abutting property that is vacant or improved with an agricultural or residential use.*”

As noted by Technical Staff, “The proposed building and parking lot will be well screened from the abutting residential areas by existing tree stands and new landscape plantings.” Exhibit 28, p. 14. At page 20 of its report, Staff observed, “Parking for the proposed facility will be largely screened from Bel Pre Road by the existing Church, and from the surrounding residential

buildings by existing tree stands and proposed landscape plantings.” After detailing the landscaping around the parking areas on pages 25-26 of its report, Technical Staff added (Exhibit 28, p. 27), “The proposed setbacks, perimeter landscaping, and retained tree stands will provide an appropriate buffer between the proposed buildings and the adjacent multi-unit buildings.” Applicant’s land planner, Kevin Foster, who is also an expert in landscape architecture, testified that the Applicant did a “great job” of siting the proposed building and buffering it with landscaping. Tr. 82.

The Hearing Examiner accepts Staff’s assessment and the undisputed testimony of Mr. Foster, and finds that the proposed use meets the landscaping and screening criteria required by Division 59-6.5 of the Zoning Ordinance to the extent necessary to ensure compatibility, which is the standard set forth in Zoning Ordinance §59.7.3.1.e.1.b. for the Hearing Examiner’s review of compliance with Article 59-6.

4. Outdoor Lighting

Conclusion: The outdoor lighting proposed for the conditional use was discussed in Part II.C.2. of this Report and Decision. As indicated there, permissible lighting levels for a conditional use are specified in Zoning Ordinance §59.6.4.4.E., which provides,

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

The proposed fixtures must also meet the design requirements and fixture height limits specified in Zoning Ordinance §59.6.4.4.B.

Although Technical Staff indicates that none of the lot lines of the conditional use site abut a lot with a detached house (Exhibit 28, p. 26), the Hearing Examiner notes that the pastor’s

existing residence will remain in an abutting lot, after subdivision. Nevertheless, the Hearing Examiner's own inspection of the photometric plan reproduced on page 20 of this Report and Decision demonstrates that the lighting from the subject site will not exceed the statutory standard of 0.1 foot-candles along the abutting property line; nor, it appears, will it exceed that standard on any lot line. Technical Staff agreed, stating (Exhibit 28, p. 29), "As demonstrated on the photometric plan, lighting for the project will be 0.0 footcandles at all property lines, so light associated with the facility will not create a nuisance to neighbors."

Technical Staff's review of the lighting levels also found that the grounds will be adequately lit (Exhibit 28, p. 10):

Proposed lighting is designed to ensure safety while limiting illumination at the Property line. Thirteen luminaires on twelve-foot poles will be located in front of the building and throughout the parking lot. Fourteen dome louvers are proposed to illuminate the sidewalk adjacent to the driveway

The proposed lighting will also meet the applicable design standards, as the proposed fixture mounting heights are all under the maximums allowed by the Zoning Ordinance.

There is no evidence in this record to refute Applicant's photometric study and Technical Staff's findings. Therefore, the Hearing Examiner finds that the proposed lighting for the conditional use will meet the Zoning Ordinance standards and will not cause undue harm to neighboring properties due to illumination.

5. Signage

Permitted signage for residential zones is set forth in Zoning Ordinance §59.6.7.8. Additional signage area is allowed for subdivisions and multiunit developments, as specified in Zoning Ordinance §59.6.7.8.B.1.:

B. Additional Sign Area

1. Subdivision and Multi-Unit Development Location Sign

Additional sign area is allowed for a permanent location sign erected at any entrance to a subdivision or Multi-Unit development if the sign is a ground

- sign or wall sign located at an entrance to the subdivision or building.*
- a. 2 signs are allowed for each entrance.*
 - b. The maximum sign area is 40 square feet per sign.*
 - c. If the driveway entrance to the subdivision or development is located in the right-of-way, a revocable permit issued jointly by the Sign Review Board and the appropriate transportation jurisdiction must be obtained to erect the sign.*
 - d. The maximum height of a sign is 26 feet.*
 - e. The sign may be illuminated (see Section 6.7.6.E).*

The signage proposed by the Applicant was described and depicted in Part II.C. 2. of this Report and Decision. As stated there, the Applicant proposes two monument signs for the subject site, one at the Bel Pre Road entrance to the site (measuring about 35 square feet) and the other at the entry to the proposed parking lot (measuring about 28 square feet). Exhibit 28, pp. 10 and 27. The proposed signs are depicted on page 7 of the revised Conditional Use Plan (Exhibit 37(g)), and are reproduced on page 22 of this Report and Decision.

Conclusion: The proposed Independent Living Facility for Seniors or Persons with Disabilities meets the definition of a multi-unit development. Therefore, it is allowed more sign area in a residential zone under Section 59.6.7.8.B.1, quoted above. The proposed signs appear to meet the sign placement and design requirements of Section 59.6.7.6.B., and the Hearing Examiner therefore finds that they comport with the applicable Zoning Ordinance standards for signs. Nevertheless, because one sign will be located at the driveway entrance along Bel Pre Road, the Applicant must first obtain “. . . a revocable permit issued jointly by the Sign Review Board and the appropriate transportation jurisdiction” before erecting a sign. Zoning Ordinance §59.6.7.8.B.1.c. A condition is imposed in Part IV of this Report and Decision ensuring compliance with the Zoning Ordinance and permitting requirements for signs.

IV. Conclusion and Decision

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Parkview at Aspen Hill, LLLP (CU 17-04) for a conditional use under Section 59.3.3.2.C.2.b. of the Zoning Ordinance to build and operate an Independent Living Facility for Seniors or Persons with Disabilities, at 3132 Bel Pre Road, in the Aspen Hill area of Silver Spring, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant and any successors in interest shall be bound by the testimony of Applicant's witnesses and the representations of its counsel identified in this Report and Decision.
2. No more than 120 independent living units are allowed in the facility.
3. Except in emergencies, a maximum of four employees may work at the facility at any given time.
4. Fifteen percent of the units must be reserved for households of very low income as defined in Zoning Ordinance Section 59.1.4.2.
5. Occupancy of the dwelling units shall be in accordance with Zoning Ordinance Section 59.3.3.2.C.2, and any amendment thereto.
6. The facility must meet all applicable Federal, State, and County licensure, certificate, and regulatory requirements.
7. The Applicant and any successors in interest must obtain approval of a Preliminary Plan of Subdivision per Chapter 50 of the Montgomery County Code. The Applicant and any successors in interest must report to OZAH any proposed changes to the conditional use plans as a result of Subdivision proceedings, and must file a copy of the proposed amended plans with OZAH.
8. Prior to any land disturbing activities, the Applicant must receive approval of a Final Forest Conservation Plan by the Montgomery County Planning Board.
9. Trash and recycling must be picked up between 7 AM and 9 PM.
10. The facility must be operated in accordance with all applicable County noise regulations, and if found in violation any such regulation, appropriate steps must immediately be taken to ensure future compliance.

11. Any proposed change in the identity of the holder of the conditional use must be reported to OZAH for approval, with notice to the Department of Permitting Services, the Planning Department and the Board of Appeals.
12. The conditional use must be operated in a manner so as to provide the facilities and services to residents outlined in Applicant's Statement of Operations (Exhibit 6). Use of the on-site facilities and services must be restricted to residents of the conditional use site, their guests and employees, and personnel providing services to the residents.
13. The Applicant must obtain a sign permit issued jointly by the Sign Review Board and the appropriate transportation jurisdiction for any proposed sign, and must file a copy of any such sign permit with OZAH. The final design of the proposed sign must be in compliance with the Zoning Ordinance restrictions for signs displayed in a residential zone, or the Applicant must first obtain a sign variance from the Sign Review Board.
14. Waivers of the following provisions of Division 6.2 are hereby granted pursuant to Zoning Ordinance §59.6.2.10:
 - from Section 59.6.2.4.C., reducing the number of required bicycle spaces to 10 long-term bicycle spaces and 5 short-term spaces; and
 - from Section 59.6.2.5.K 2.b. reducing the minimum side yard setback along the northern lot line for the parking facility to 9 feet, instead of 34 feet.
15. The Applicant and any successors in interest must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant and any successors in interest shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Issued this 25th day of January, 2017.



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record

or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600

NOTICES TO:

Patricia Harris, Esquire
Parkview at Aspen Hill, LLLP, Applicant
c/o Ivy Dench-Carter
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Emily Tettelbaum, Planning Department
Department of Permitting Services
Division of Zoning & Site Plan Enforcement